

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 690

JAMES B. DILLINGHAM, AS PRESIDENT; SYLVANUS B. NYE, AS VICE-PRESIDENT; FREDERICK A. BALLOU, AS SECRETARY, ETC., ET AL., APPELLANTS,

vs.

GEORGE V. McLAUGHLIN, AS SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK; CARL SHERMAN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK

No. 691

GEORGE V. McLAUGHLIN, AS SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK; CARL SHERMAN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, APPELLANTS,

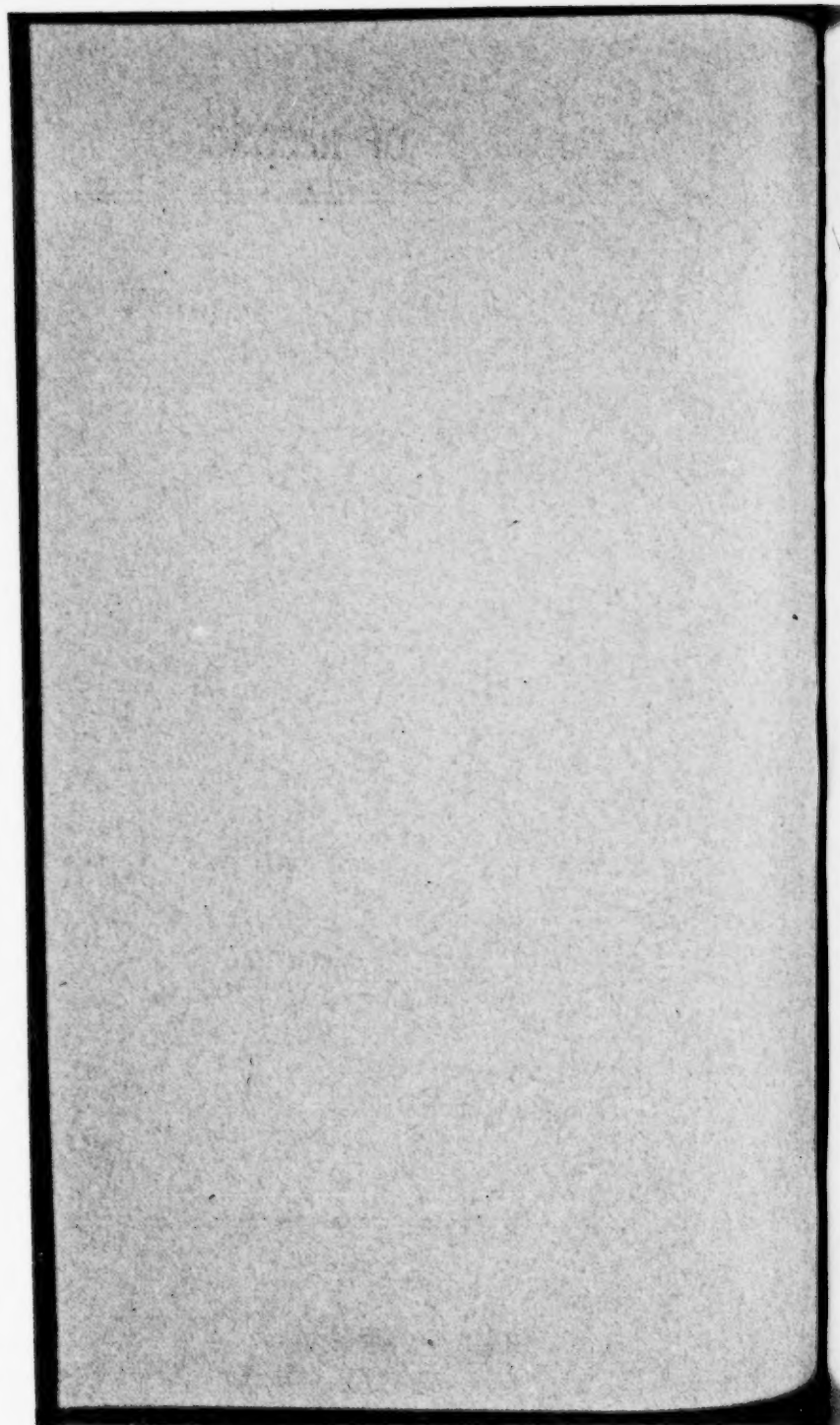
vs.

JAMES B. DILLINGHAM, AS PRESIDENT; SYLVANUS B. NYE, AS VICE-PRESIDENT; FREDERICK A. BALLOU, AS SECRETARY, ETC., ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

FILED DECEMBER 16, 1923

(30,000, 30,001)



(30,000, 30,001)

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

INDEX

	Page
Record from U. S. district court, northern district of New York.....	1
Order to show cause and temporary restraining order.....	1
Application for interlocutory injunction.....	10
Bill of complaint.....	15

	Page
Affidavit of James B. Dillingham.....	32
Frederick A. Ballou.....	43
Leonard W. H. Gibbs.....	40
Frederick A. Ballou.....	43
Schedule A—Blank form of application for loan contract.....	45
Schedule B—Blank form of loan contract.....	47
Joint and several answer of McLaughlin et al.....	49
Affidavit of George V. McLaughlin.....	53
James B. Dillingham.....	61
Lewis H. Allen.....	73
Schedule A—Statement of face value of contracts necessary to refill series, etc.....	76
Affidavit of Charles E. McManus.....	78
Minutes of proceedings before constitutional court.....	91
Final decree.....	157
Petition for appeal.....	159
Assignment of errors on appeal.....	160
Citation	163
Petition for cross-appeal.....	164
Assignment of errors on cross-appeal.....	167
Order allowing cross-appeal.....	169
Citation	171
Stipulation as to record.....	173
Clerk's certificate.....	174
Schedule C, Chart No. 3—Statistical table of Mutual Benefit League of North America.....	175

IN THE DISTRICT COURT OF THE UNITED 1
 STATES FOR THE NORTHERN DISTRICT
 OF NEW YORK
 IN EQUITY.....

JAMES B. DILLINGHAM, as President, SYL-
 VANUS B. NYE, as Vice-President, FRED-
 ERICK A. BALLOU, as Secretary and Treas-
 urer, and each of them as Trustees of the
 Mutual Benefit League of North America, ep- 2
 erating under an agreement and Declaration
 of Trust,

Plaintiff,

vs

GEORGE V. McLAUGHLIN, as Superintendent
 of Banks, of the State of New York, CARL
 SHERMAN, as Attorney General of the State 3
 of New York, et al,

Defendants.

Order to Show Cause and Temporary Restraining
 Orders, Application for Interlocutory Injunc-
 tion.

Bill of Complaint and Affidavit.

OLIVER D. BURDEN

Solicitor for Plaintiff,

4

Office and Post Office Address,
 914 University Block,
 Syracuse, N. Y.

5

6

STATEMENT

An appeal and cross appeal, having been filed herein, the respective statements of the case will be made by each party in the brief filed by it.

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8

IN THE DISTRICT COURT OF THE UNITED 9
 STATES
 FOR THE NORTHERN DISTRICT OF
 NEW YORK
 IN EQUITY

JAMES B. DILLINGHAM, as President, SYLVANUS B. NYE, as Vice-President, FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the Mutual Benefit League of North America, 10
 operating under an agreement and Declaration of Trust,

Plaintiff,

against

GEORGE B. McLAUGHLIN, as Superintendent of Banks of the State of New York, CARL SHERMAN, as Attorney General of the State of New York; GUY B. MOORE, as District Attorney of the County of Erie, N. Y.; CHARLES J. HERRICK, as District Attorney 11
 of the County of Albany, N. Y.; LEE FASSETT, as District Attorney of the County of Alleghany, N. Y.; EDWARD J. GLENNON, as District Attorney of the County of Bronx, N. Y.; URBANE C. LYONS, as District Attorney of the County of Broome, N. Y.; ARCHIBALD M. LAIDLAW, as District Attorney of the County of Cattaragus, N. Y.; BENN KENYON, as District Attorney of the County of Cayuga, N. Y.; GLENN G. WOOD-
 IN, as District Attorney of the County of Chautauqua, N. Y.; WALTER B. HEREN- 12
 DEEN, as District Attorney of the County of Chemung, N. Y.; WARD N. TRUESDALE, as District Attorney of the County of Chenango, N. Y.; HAROLD A. JERRY, as District

- 13 Attorney of the County of Clinton, N. Y.; JOHN C. TRACEY, as District Attorney of the County of Columbia, N. Y.; ALBERT HASKELL, Jr., as District Attorney of the County of Cortland, N. Y.; A. LINDSAY O'CONNOR, as District Attorney of the County of Delaware, N. Y.; ALLEN S. REYNOLDS, as District Attorney of the County of Dutchess, N. Y.; O. BYRON BREWSTER, as District Attorney of the County of Essex, N. Y.; HAROLD W. MAIN, as District Attorney of the County of Frank-
- 14 lin, N. Y.; J. WM. TITCOMB, as District Attorney of the County of Fulton, N. Y.; CHARLES G. COFFIN, as District Attorney of the County of Greene, N. Y.; HERBERT A. PALMATIER, as District Attorney of the County of Hamilton, N. Y.; W. EARL WARD, as District Attorney of the County of Herkimer, N. Y.; EDMUND ROBERT WILCOX, as District Attorney of the County of Jefferson, N. Y.; CHARLES J. DODD, as District Attorney of the County of Kings,
- 15 N. Y.; FRED L. SMITH, as District Attorney of the County of Lewis, N. Y.; CHARLES W. KNAPPENBERG, as District Attorney of the County of Livingston, N. Y.; WM. L. BURKE, as District Attorney of the County of Madison, N. Y.; WILLIAM F. LOVE, as District Attorney of the County of Monroe, N. Y.; NEWTON J. HERRICK, as District Attorney of the County of Montgomery, N. Y.; CHARLES R. WEEKS, as District Attorney of the County of Nassau,
- 16 N. Y.; JOAB H. BANTON, as District Attorney of the County of New York, N. Y.; BURT A. DUQUETTE, as District Attorney of the County of Niagara, N. Y.; CHARLES L. DeANGELIS, as District Attorney of the County of Oneida, N. Y.; FRANK P. MALPASS, as District Attorney of the County

of Onondaga, N. Y.; NATHAN D. LAPHAM, 17
 as District Attorney of the County of Ontario,
 N. Y.; J. D. WILSON, Jr., as District Attor-
 ney of the County of Orange, N. Y.; WM.
 H. MUNSON, as District Attorney of the
 County of Orleans, N. Y.; DON A. COLONY,
 as District Attorney of the County of Oswego,
 N. Y.; ADRIAN A. PIERSON, as District
 Attorney of the County of Otsego, N. Y.;
 JAMES W. BAILEY, as District Attorney
 of the County of Putnam, N. Y.; DANA
 WALLACE, as District Attorney of the
 County of Queens, N. Y.; TIMOTHY F. 18.
 QUILLINAN, as District Attorney of the
 County of Rensselaer, N. Y.; JOSEPH MA-
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 Y.; CHARLES B. ANDRUS, as District
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 ALEXANDER T. BLESSING, as District
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 N. Y.; CLYDE H. PROPER, as District
 Attorney of the County of Schoharie, N. Y.;
 ARTHUR R. ELLISON, as District Attor-
 ney of the County of Schuyler, N. Y.; LEON
 S. CHURCH, as District Attorney of the
 County of Seneca, N. Y.; GUY W. CHANEY,
 as District Attorney of the County of Steuben,
 N. Y.; LEROY M. YOUNG, as District Attor-
 ney of the County of Suffolk, N. Y.; HENRY
 F. GARDNER, as District Attorney of the
 County of Sullivan, N. Y.; NATHAN TURK,
 as District Attorney of the County of Tioga, 20
 N. Y.; ARTHUR G. ADAMS, as District
 Attorney of the County of Tompkins, N. Y.;
 FREDERICK G. TRAVER, as District
 Attorney of the County of Ulster, N. Y.;
 FRED M. BECKWITH, as District Attorney

- 21 of the County of Warren, N. Y.; WYMAN S. BASCIM, as District Attorney of the County of Washington, N. Y.; WILFORD T. PURCHASE, as District Attorney of the County of Wayne, N. Y.; ARTHUR ROWLAND, as District Attorney of the County of Westchester, N. Y.; CLARENCE H. GRAFF, as District Attorney of the County of Wyoming, N. Y.; JOHN T. KNOX, as District Attorney of the County of Yates, N. Y.
- Defendants.*

- 22 The application of the Plaintiff for the issuance of an interlocutory injunction in this suit, having been presented to me, and the papers submitted in support of the application having been filed herein, it is,

- ORDERED: That said application to be heard before the court, constituted in the matter prescribed in Section 266 of the Judicial Code of the United States on the 25th day of June, 1923, at 10:00 o'clock in the forenoon of that day, at the
- 23 Court House in the Post Office Building in the City of Albany, State of New York, and the Defendants, and each of them, at such time and place, show cause why an order should not be made herein suspending and restraining the enforcement of Chapter 895 of the laws of 1923 of the State of New York, purporting to be an act to amend the Banking Laws, in relation to encroachments by individuals and Trustees or otherwise upon powers of private Bankers, Savings Banks,
- 24 or Savings and Loan Associations, purporting to be a new section, and to be Section 174, and amending Article 4 of Chapter 369 of the Laws of 1914, pending the final decree in this suit and enjoining and restraining, pending such final decree

in this suit, until the further order of this 25
 Court, the Defendants, and each of them,
 their and each of their successors, deputies,
 assistants, employees, any and every person acting
 and purporting to act under and by virtue of
 the authority of such chapter of the laws of 1923,
 or any other provision of law, or in any
 way enforcing or attempting to enforce against
 the Plaintiff the provisions of said act, or from
 instituting or causing to be instituted any suit,
 action or criminal proceeding to enforce the said 26
 statute or any provision thereof, or from doing
 any acts or thing interfering with the right or
 authority of the plaintiff to engage in the business
 of receiving deposits of money or payment of
 money in installments for saving or investment
 purposes in sums of less than \$500 each, under a
 declaration of trust or otherwise, or from soliciting
 by the publication or circulation of its literature,
 the deposit of money with or the payment of money
 to it in sums of less than \$500 each, or from enter- 27
 ing into contracts with present or prospective
 contract holders, under which payments of money
 in installments of less than \$500 may become due
 and payable, or to make loans upon real estate
 security for building, home-owning, savings or
 investment purposes; further, from doing any acts
 or thing interfering with the right or authority
 of the plaintiff to accept payment of principal and
 interest upon mortgages held by it, or to accept
 payment on contracts already written by it, or to 28
 enter into contracts and make loans on real estate,
 or to make loans on real estate with money already
 accumulated by it, or to do any act or thing which
 it might lawfully do if the provisions of said act

29 have not been enacted, and were not operative, and for such other, further or different relief as the Court shall deem just and proper in the premises, should not be granted;

It appearing, and the Court being of the opinion, that immediate and irreparable loss or damage would result to Plaintiff if the provisions of said chapter of the Laws of 1923 were enforced pending the hearing and determination of such application; it is further

30 ORDERED: That pending the hearing and determination of such application for such interlocutory injunction, the defendants, and each of them, their successors, deputies, assistants and employees, and any and every person acting or purporting to act under and by virtue of the authority of such Chapter 895 of the laws of 1923, be and hereby are, and each of them hereby is, enjoined and restrained from in any way enforcing or attempting to enforce against the plaintiff the
31 provisions of said act, or upon instituting or causing to be instituted any suit, action or criminal proceeding to enforce such statute, or any portion thereof, or from doing any act or thing interfering with the right or authority of the plaintiff to continue to carry out his contracts with contract owners, present and prospective, and to do any and all of the acts and things specified in the declaration of trust upon which the Plaintiff was formed: and it is further

32 ORDERED: That any answering affidavit of the Defendants be served upon the solicitor for the Plaintiff at least five days before the date hereinbefore set for the hearing of such applica-

tions, and that any affidavits of the Plaintiff in 33
reply thereto to be served upon the solicitors for
the Defendants on or before the day of such hear-
ing: and it is further

ORDERED: That a copy of this order be
served personally or by registered mail at least
ten days before the date hereinbefore set for the
hearing of such application, upon HON. ALFRED
E. SMITH, Governor of the State of New York,
upon CARL SHERMAN, Attorney General of the
State of New York, upon GEORGE V. 34
McLAUGHLIN, Superintendent of Banks of the
State of New York, and upon all the defendants
in this suit.

Dated: Binghamton, N. Y., June 11, 1923.

FRANK COOPER,

United States District Judge.

37 IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT
OF NEW YORK

IN EQUITY:

JAMES B. DILLINGHAM, as President, SYLVANUS B. NYE, as Vice-President, FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the Mutual Benefit League of North America,
38 operating under an agreement and Declaration of Trust,

Plaintiff,

against

GEORGE B. McLAUGHLIN, as Superintendent of Banks of the State of New York, CARL SHERMAN, as Attorney General of the State of New York; GUY B. MOORE, as District Attorney of the County of Erie, N. Y.; CHARLES J. HERRICK, as District Attorney of the County of Albany, N. Y.;
39 FASSETT, as District Attorney of the County of Alleghany, N. Y.; EDWARD J. GLENNON, as District Attorney of the County of Bronx, N. Y.; URBANE C. LYONS, as District Attorney of the County of Broome, N. Y.; ARCHIBALD M. LAIDLAW, as District Attorney of the County of Cattaragus, N. Y.; BENN KENYON, as District Attorney of the County of Cayuga, N. Y.; GLENN G. WOODIN, as District Attorney of the County of Chautauqua, N. Y.;
40 WALTER B. HERENDEEN, as District Attorney of the County of Chemung, N. Y.; WARD N. TRUESDALE, as District Attorney of the County of Chenango, N. Y.; HAROLD A. JERRY, as District Attorney of the County of Clinton, N. Y.; JOHN C. TRACEY, as District Attorney of

the County of Columbia, N. Y.; ALBERT 41
HASKELL, Jr., as District Attorney of the
County of Cortland, N. Y.; A. LINDSAY
O'CONNOR, as District Attorney of the
County of Delaware, N. Y.; ALLEN S.
REYNOLDS, as District Attorney of the
County of Dutchess, N. Y.; O. BYRON
BREWSTER, as District Attorney of the
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as District Attorney of the County of Frank-
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Attorney of the County of Fulton, N. Y.;
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ney of the County of Greene, N. Y.; HERB-
ERT A. PALMATIER, as District Attorney
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trict Attorney of the County of Livingston,
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of the County of Madison, N. Y.; WILLIAM
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BURT A. DUQUETTE, as District Attorney
of the County of Niagara, N. Y.; CHARLES 44
L. DeANGELIS, as District Attorney of the
County of Oneida, N. Y.; FRANK P. MAL-
PASS, as District Attorney of the County
of Onondaga, N. Y.; NATHAN D. LAPHAM,
as District Attorney of the County of Ontario,

- 45 N. Y.; J. D. WILSON, Jr., as District Attorney of the County of Orange, N. Y.; WM. H. MUNSON, as District Attorney of the County of Orleans, N. Y.; DON A. COLONY, as District Attorney of the County of Oswego, N. Y.; ADRIAN A. PIERSON, as District Attorney of the County of Otsego, N. Y.; JAMES W. BAILEY, as District Attorney of the County of Putnam, N. Y.; DANA WALLACE, as District Attorney of the County of Queens, N. Y.; TIMOTHY F. QUILLINAN, as District Attorney of the
- 46 County of Rensselaer, N. Y.; JOSEPH MALLOY, as District Attorney of the County of Richmond, N. Y.; MORTON LEXOW, as District Attorney of the County of Rockland, N. Y.; WILLIAM D. INGRAM, as District Attorney of the County of St. Lawrence, N. Y.; CHARLES B. ANDRUS, as District Attorney of the County of Saratoga, N. Y.; ALEXANDER T. BLESSING, as District Attorney of the County of Schenectady, N. Y.; CLYDE H. PROPER, as District Attorney of the County of Schoharie, N. Y.;
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- 48 FREDERICK G. TRAVER, as District Attorney of the County of Ulster, N. Y.; FRED M. BECKWITH, as District Attorney of the County of Warren, N. Y.; WYMAN S. BASCIM, as District Attorney of the

County of Washington, N. Y.; WILFORD T. PURCHASE, as District Attorney of the County of Wayne, N. Y.; ARTHUR ROWLAND, as District Attorney of the County of Westchester, N. Y.; CLARENCE H. GRAFF, as District Attorney of the County of Wyoming, N. Y.; JOHN T. KNOX, as District Attorney of the County of Yates, N. Y.

Defendants.

Upon the complaint herein, and the affidavits of James B. Dillingham, Frederick A. Ballou, and 50 Leonard W. H. Gibbs, each verified June 9th, 1923, plaintiff above named, makes application for an interlocutory injunction suspending and restraining the enforcement of Chapter 895 of the Laws of 1923 of the State of New York, pending the final decree of this suit, and enjoining and restraining pending such final decree, and until the further order of the Court, the defendants and each of them, their and each of their successors, deputies, ~~assistants and employees~~, and any and 51 every person acting or purporting to act under and by virtue of the authority of said Chapter 895 of the Laws of 1923 of the State of New York, or any other provision of law, from in any way enforcing or attempting to enforce against the plaintiff, the provisions of said acts, or any of them, and from instituting or causing to be instituted any action or proceeding to enforce such practice, or any provision thereof, or from doing any act or thing interfering with the right or 52 authority of plaintiff to carry out its contracts with its contract holders as provided in its declaration of trust upon which it is founded, which it might lawfully do if the provisions of such statute

53 had not been enacted and its provisions were not operative.

Plaintiff respectfully prays that this application be heard and determined at the earliest practical day in accordance with the provisions of Section 266, of the Judicial Code.

Dated at Binghamton, N. Y., June 11, 1923.

OLIVER D. BURDEN

Solicitor for Plaintiff,

54 Office and P. O. Address,
914-918 University Bldg.,
Syracuse, N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

IN EQUITY:

JAMES B. DILLINGHAM, as President, SYLVANUS B. NYE, as Vice-President, FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the Mutual Benefit League of North America, operating under an agreement and Declaration of Trust,

67

Plaintiff,

against

GEORGE B. McLAUGHLIN, as Superintendent of Banks of the State of New York, CARL SHERMAN, as Attorney General of the State of New York; GUY B. MOORE, as District Attorney of the County of Erie, N. Y.; CHARLES J. HERRICK, as District Attorney of the County of Albany, N. Y.; LEE FASSETT, as District Attorney of the County of Alleghany, N. Y.; EDWARD J. GLENNON, as District Attorney of the County of Bronx, N. Y.; URBANE C. LYONS, as District Attorney of the County of Broome, N. Y.; ARCHIBALD M. LAIDLAW, as District Attorney of the County of Cattaragus, N. Y.; BENN KENYON, as District Attorney of the County of Cayuga, N. Y.; GLENN G. WOODIN, as District Attorney of the County of Chautauqua, N. Y.; WALTER B. HERENDEEN, as District Attorney of the County of Chemung, N. Y.; WARD N. TRUESDALE, as District Attorney of the County of Chenango, N. Y.; HAROLD A. JERRY, as District Attorney of the County of Clinton, N. Y.; JOHN C. TRACEY, as District Attorney of

69

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- 61 the County of Columbia, N. Y.; ALBERT HASKELL, Jr., as District Attorney of the County of Cortland, N. Y.; A. LINDSAY O'CONNOR, as District Attorney of the County of Delaware, N. Y.; ALLEN S. REYNOLDS, as District Attorney of the County of Dutchess, N. Y.; O. BYRON BREWSTER, as District Attorney of the County of Essex, N. Y.; HAROLD W. MAIN, as District Attorney of the County of Franklin, N. Y.; J. WM. TITCOMB, as District Attorney of the County of Fulton, N. Y.;
- 62 CHARLES G. COFFIN, as District Attorney of the County of Greene, N. Y.; HERBERT A. PALMATIER, as District Attorney of the County of Hamilton, N. Y.; W. EARL WARD, as District Attorney of the County of Herkimer, N. Y.; EDMUND ROBERT WILCOX, as District Attorney of the County of Jefferson, N. Y.; CHARLES J. DODD, as District Attorney of the County of Kings, N. Y.; FRED L. SMITH, as District Attorney of the County of Lewis, N. Y.;
- 64 CHARLES W. KNAPPENBERG, as District Attorney of the County of Livingston, N. Y.; WM. L. BURKE, as District Attorney of the County of Madison, N. Y.; WILLIAM F. LOVE, as District Attorney of the County of Monroe, N. Y.; NEWTON J. HERRICK, as District Attorney of the County of Montgomery, N. Y.; CHARLES R. WEEKS, as District Attorney of the County of Nassau, N. Y.; JOAB H. BANTON, as District Attorney of the County of New York, N. Y.; BURT A. DUQUETTE, as District Attorney of the County of Niagara, N. Y.;
- 64 CHARLES L. DeANGELIS, as District Attorney of the County of Oneida, N. Y.; FRANK P. MALPASS, as District Attorney of the County of Onondaga, N. Y.; NATHAN D. LAPHAM, as District Attorney of the County of Ontario,

N. Y.; J. D. WILSON, Jr., as District Attorney 65
 of the County of Orange, N. Y.; WM.
 H. MUNSON, as District Attorney of the
 County of Orleans, N. Y.; DON A. COLONY,
 as District Attorney of the County of Oswego,
 N. Y.; ADRIAN A. PIERSON, as District
 Attorney of the County of Otsego, N. Y.;
 JAMES W. BAILEY, as District Attorney
 of the County of Putnam, N. Y.; DANA
 WALLACE, as District Attorney of the
 County of Queens, N. Y.; TIMOTHY F.
 QUILLINAN, as District Attorney of the
 County of Rensselaer, N. Y.; JOSEPH MA- 66
 LOY, as District Attorney of the County of
 Richmond, N. Y.; MORTON LEXOW, as
 District Attorney of the County of Rockland,
 N. Y.; ~~WILLIAM D. INGRAM~~, as District
 Attorney of the County of St. Lawrence, N.
 Y.; CHARLES B. ANDRUS, as District
 Attorney of the County of Saratoga, N. Y.;
 ALEXANDER T. BLESSING, as District
 Attorney of the County of Schenectady,
 N. Y.; CLYDE H. PROPER, as District
 Attorney of the County of Schoharie, N. Y.; 67
 ARTHUR R. ELLISON, as District Attor-
 ney of the County of Schuyler, N. Y.; LEON
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 County of Seneca, N. Y.; GUY W. CHANEY,
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 F. GARDNER, as District Attorney of the
 County of Sullivan, N. Y.; NATHAN TURK,
 as District Attorney of the County of Tioga,
 N. Y.; ARTHUR G. ADAMS, as District
 Attorney of the County of Tompkins, N. Y.; 68
 FREDERICK G. TRAVER, as District
 Attorney of the County of Ulster, N. Y.;
 FRED M. BECKWITH, as District Attorney
 of the County of Warren, N. Y.; WYMAN
 S. BASCIM, as District Attorney of the

69

County of Washington, N. Y.; WILFORD T. PURCHASE, as District Attorney of the County of Wayne, N. Y.; ARTHUR ROWLAND, as District Attorney of the County of Westchester, N. Y.; CLARENCE H. GRAFF, as District Attorney of the County of Wyoming, N. Y.; JOHN T. KNOX, as District Attorney of the County of Yates, N. Y.
Defendants.

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TO THE JUDGES OF THE DISTRICT COURT 73
OF THE UNITED STATES:
FOR THE NORTHERN DISTRICT OF
NEW YORK:

The Mutual Benefit League of North America, a common law trust operating under and by virtue of a declaration of trust duly filed in the office of the Clerk of the County of Erie on the 28th day of July, 1921, having its principal place of business in the City of Buffalo, County of Erie and State of New York, through JAMES B. DILLINGHAM, as President, SYLVANUS B. NYE, as Vice-President, FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the Mutual Benefit League of North America, operating under an agreement and Declaration of Trust, brings this, its complaint, against George V. McLaughlin, as Superintendent of Banks of the State of New York; Carl Sherman, as Attorney General of the State of New York; and the various district attorneys of the various counties of the State of New York; and thereupon plaintiff alleges: 74

FIRST: Plaintiff duly organized as a common law trust by filing a declaration of trust in the office of the County Clerk of the County of Erie on the 28th day of July, 1921, for the purpose of furnishing to its contract owners, at low cost, financial assistance to buy or build homes, or otherwise improve real estate, and since July 28th, 1921, has been and still is engaged in said business under said agreement and declaration of trust. 75 76

SECOND: The primary object of plaintiff is to loan money to its contract owners to enable

77 them to own homes. In order to create funds with which to make loans, all contract owners make monthly deposits of one per cent of the face value of their contract, and take turns in borrowing as the money is accumulated. No outside capital is employed, as the League is simply the medium which brings the co-operators together and enables them to assist one another. The business of the League is managed by three trustees. Their work is subject to the approval and recommendation of an Advisory Board of Contract Owners. Trust
78 or loan funds, created by the monthly deposits of all contract owners, are loaned only to contract owners at three per cent annual interest. All loans are secured by first mortgages on improved real estate.

THIRD: During the period of its existence, plaintiff has issued contracts to contract holders to the number of approximately nine thousand. The amount of loans made on first mortgages at three per cent by plaintiff and still outstanding
79 approximates \$220,000.00 The aggregate amount represented by contracts already written during the period of the existence of plaintiff, face value, approximates seven million dollars, which amount, when all paid in under the contracts as written, will be available for loans to contract owners.

Contracts are issued in units of any amount from one hundred dollars up, and are placed in series of approximately \$140,000.00 total face value. Each series is entirely separate from all
80 others and accumulates funds from its own depositors only. Contracts of plaintiff so entered into with its contract holders are negotiable. The owner may sell his contract at any time, either before or after maturity, and if he does not wish to

use a loan himself, he may sell his privilege to borrow to another, thus realizing a profit. 81

A copy of the standard form used by plaintiff during the term of its existence, for application for a three per cent loan contract, is hereto annexed and marked Schedule A and made a part hereof.

A copy of the contract with contract holders used by plaintiff during the period of its existence, is hereto annexed and marked Schedule B and made a part hereof.

FOURTH: Plaintiff operating under said agreement and declaration of trust, the substantial provisions of which are embodied in Schedule B hereto annexed, owns valuable assets, to wit: 82
Cash in bank approximating \$75,000.00; first mortgages on real estate approximating \$220,000.00; office equipment, supplies, and so forth, approximating \$15,000.00; contracts with contract holders approximating \$7,000,000.00.

Plaintiff employs, directly and indirectly, upon part time and whole time, approximately 200 persons. 83

FIFTH: The territory served by the plaintiff comprises a large number of counties in the state of New York and throughout the State of New York. There has been an increase in its business during the existence of plaintiff, and the same continues to increase from day to day in the amount of moneys handled, number of contracts written, number of loans made, and a continuous increase in capital, surplus and reserve fund of plaintiff. 84

SIXTH: An act of the Legislature of the State of New York, approved by the Governor of such State June 2nd, 1923, and taking effect immedi-

85 ately, being Chapter 895 of the Laws of 1923, en-
 titled "An act to amend the Banking Law in rela-
 tion to encroachment of individuals as trustees or
 otherwise upon powers of private banks, savings
 banks or savings and loan associations," amending
 or purporting to amend Article 4, of Chapter 369
 of the Laws of 1914, entitled "An Act in relation
 to banking corporations, individuals, partnerships,
 incorporated associations, and corporations under
 the supervision of the Banking Department, con-
 86 stituting Chapter 2 of the Consolidated Laws."
 adding or purporting to add thereto a new section
 to be Section 174, to read as follows:

"Section 1. Article four of chapter three hun-
 dred and sixty-nine of the laws of nineteen hundred
 and fourteen, entitled 'An act in relation to bank-
 ing corporations, individuals, partnerships, unin-
 corporated associations and corporations under
 the supervision of the banking department, con-
 stitution chapter two of the consolidated laws,' is
 87 hereby amended by adding thereto a new section,
 to be section one hundred and seventy-four, to read
 as follows:

174. Prohibitions against encroachment by indi-
 viduals as trustees or otherwise upon certain pow-
 ers of private bankers, of savings banks or savings
 and loan associations. Except as hereinbefore
 authorized, no individual, either for himself or as
 trustee, and no partnership or unincorporated
 association, shall engage in the business of receiv-
 88 ing deposits of money or payments of money in
 installments, for co-operative, mutual loan, savings
 or investment purposes in sums of less than five
 hundred dollars each under a declaration of trust
 or otherwise, and no person shall within this State,

either personally or by the publication or circula- 89
tion of advertisements solicit the deposit of money
with or the payment of money to, any such unau-
thorized individual, trustee, partnership or unin-
corporated association in sums of less than five
hundred dollars each or the execution of a decla-
ration of trust to or a contract with, any such
unauthorized individual, trustee, partnership or
unincorporated association, under which such
deposits of payments of money in instalments of
less than five hundred dollars will become due and 90
payable; nor shall any such unauthorized individ-
ual, trustee, partnership or unincorporated assoc-
iation engage in or conduct a business similar to
the business of a savings bank or of a savings and
loan association, or promise to make loans at any
time, either fixed or uncertain, upon real estate
security for building, home-owning, savings or
investment purposes as an inducement for the pay-
ment of such sums of money in instalments of less
than five hundred dollars each to any such unauth- 91
orized person, trustee, partnership or unincorpor-
ated association.

Any person who shall violate any provision of
this section shall be guilty of a misdemeanor.

2. This act shall take effect immediately."

SEVENTH: The provisions of said purported
act are unreasonable and confiscatory, and the
enforcement of such statute against plaintiff will
deprive it of its property without due process of
law. Such statute is in violation of Article 1, Sec- 92
tion 6, of the Constitution of the State of New
York; said statute is in violation of Section 10 of
Article 1 of the Constitution of the United States,
in that it impairs the obligation of plaintiff's con-

93 tractual rights; that said statute is also in violation of the 14th Amendment to the Constitution of the United States, in that the enforcement thereof will deprive the plaintiff and its contract holders of its and their property without due process of law, take their property without just compensation, and deny to plaintiff and its contract holders the equal protection of the law; also said statute absolutely prohibits an individual or a group of individuals from engaging in a private business which,
 94 under the terms of said act, is admittedly legitimate and lawful, and permits corporations to do the very things, which, by its terms, individuals are forbidden to do; that said statute, if enforced, constitutes governmental interference which disturbs the normal adjustment, making, and consummation of legal contracts, legally entered into, and will derange the business of plaintiff, its contract owners, and other persons, and actually threaten confiscation of their property.

95 Unless plaintiff is permitted to carry out the provisions of its contracts with its said contract owners, and particularly to continue its business in accepting repayment of principal and interest upon mortgages and in accepting payment on contracts already written, and is permitted to enter into contracts to make loans on real estate, and to make loans on real estate with moneys of contract holders already accumulated, there will be an interference particularly with the options
 96 accruing to contract holders under the provisions of Section 6, of the Loan Contract, Schedule B hereto annexed, which will result in irreparable loss and damage to the plaintiff and its contract owners, and unless plaintiff is permitted to carry

out its contracts, the result will be disastrous to 97
 plaintiff, depriving it of a reasonable return upon
 its surplus, reserve fund, expense reserve fund,
 and trust fund, accumulated for the benefit of its
 said contract holders, and cause plaintiff to wind
 up and discontinue the business conducted by it.

EIGHTH: The provisions of said Chapter 895
 of the Laws of 1923 prohibiting the plaintiff from
 prosecuting its said business are arbitrary and
 unreasonable and deprive plaintiff of its property
 without due process of law, and amounts to the 98
 taking of the property of plaintiff and its contract
 owners without compensation, and is an undue
 interference with the rights and liberty of con-
 tract between plaintiff and its contract owners,
 and the attempted prevention of business by plain-
 tiff exposes plaintiff to a multiplicity of actions
 for the recovery of penalties for a violation of the
 statute, and of its contracts aforesaid, and to a
 multiplicity of proceedings for the enforcement
 thereof, involving its alleged non-compliance with 99
 the statute, with its contract obligations, to the
 great and irreparable damage and injury of the
 plaintiff, for which it has no adequate remedy at
 law or otherwise than in this suit.

Each of said defendants resides in and is a citizen
 of the State of New York, and at least one of them
 is a resident in the northern District of New York.

Defendant, George B. McLaughlin, is superin-
 tendent of Banks of the State of New York, and 100
 as such has power to report to the defendant, the
 Attorney General of the State of New York,
 alleged violations of any of the prohibitions con-
 tained in the Banking Law.

101 The Defendant, Carl Sherman, as such Attorney General, is charged by and under the laws of the State of New York, with the duty of enforcing the same and of instituting such actions, proceedings or criminal proceedings as he may be advised.

The Defendants, the District Attorneys of the various counties of the State of New York, as such, are charged with the duty of enforcing the various statutes of the State of New York, including the Statute in question; and the said defendants
102 or some of them have threatened to prosecute plaintiff, its trustees, officers and representatives, for a violation of said statute and endeavor to enforce the penalties and punishments prescribed for their violation or alleged violation.

On information and belief, the Defendants, or some of them, will attempt to enforce or have enforced against plaintiff said Chapter 895 of the Laws of 1923, unless they are enjoined from enforcing said Statutes. Plaintiff has no adequate
103 remedy at law against the enforcement thereof, and the injury and damage to plaintiff from its enforcement is and will be irreparable. Unless the defendants be restrained from enforcing said statute, plaintiff will be subjected to a multitude of actions and proceedings brought to secure its enforcement. The penalties and punishments prescribed for its violation are so oppressive and burdensome as to result in the partial destruction and confiscation of the property of plaintiff and
104 its contract owners. The amount in controversy herein greatly exceeds the sum of Three Thousand Dollars, exclusive of interests and costs.

WHEREFORE, Plaintiff prays that it be adjudged and decreed:

(1). That Chapter 895 of the Laws of 1923 is void and unconstitutional and is in contravention of Section 6 of Article 1 of the Constitution of the State of New York, and is in contravention of Section 10 of Article 1 of the 14th Amendment to the Constitution of the United States;

(2). That the enforcement of said statute in respect to all of its prohibitions against the acts of plaintiff with its contract owners, present and prospective, be suspended and restrained;

(3). That the defendants and each of them, their and each of their successors, deputies, assistants, and employees, be restrained and enjoined from enforcing the provisions of Chapter 895 of the Laws of 1923, or any part thereof, and from instituting or causing to be instituted any suit, action, proceeding or criminal proceeding to enforce said statute, or any provisions thereof.

Further, plaintiff prays that during the pendency of this suit an interlocutory injunction issue suspending and restraining the enforcement of said statute, and for such other, further or different relief as to the Court may seem just and equitable.

And it may please your Honors to grant unto the Plaintiff a writ of subpoena to issue out of and under the seal of this Court, directed to the said George V. McLaughlin, as Superintendent of Banks of the State of New York; Carl Sherman, as Attorney General of the State of New York; Guy B. Moore, as District Attorney of the County of Erie, N. Y.; Charles J. Herrick, as District Attorney of the County of Albany, N. Y.; Lee Fassett, as District Attorney of the County of Allegany, N. Y.; Edward J. Glennon, as District

- 109 Attorney of the County of Bronx, N. Y.; Urbane C. Lyons, as District Attorney of the County of **Broome**, N. Y.; Archibald M. Laidlaw, as District Attorney of the County of Cattaraugus, N. Y.; Benn Kenyon, as District Attorney of the County of Cayuga, N. Y.; Glenn G. Woodin, as District Attorney of the County of Chautauqua, N. Y.; Walter B. Herendeen, as District Attorney of the County of Chemung, N. Y.; Ward N. Truesdell, as District Attorney of the County of Chenango,
- 110 N. Y.; Harold A. Jerry, as District Attorney of the County of Clinton, N. Y.; John C. Tracey, as District Attorney of the County of Columbia, N. Y.; Albert Haskell, Jr., as District Attorney of the County of Cortland, N. Y.; A. Lindsay O'Connor, as District Attorney of the County of Delaware, N. Y.; Allen S. Reynolds, as District Attorney of the County of Dutchess, N. Y.; O. Byron Brewster, as District Attorney of the County of Essex, N. Y.; Harold W. Main, as District Attorney of the
- 111 County of Franklin, N. Y.; J. Wm. Titcomb, as District Attorney of the County of Fulton, N. Y.; Charles G. Goffin, as District Attorney of the County of Greene, N. Y.; Herbert A. Palmatier, as District Attorney of the County of Hamilton, N. Y.; W. Earl Ward, as District Attorney of the County of Herkimer, N. Y.; Edmund Robert Wilcox, as District Attorney of the County of Jefferson, N. Y.; Charles J. Dodd, as District Attorney of the County of Kings, N. Y.; Fred L.
- 112 Smith, as District Attorney of the County of Lewis, N. Y.; Charles W. Knappenberg, as District Attorney of the County of Livingston, N. Y.; Wm. L. Burke, as District Attorney of the County of Madison, N. Y.; William F. Love, as

District Attorney of the County of Monroe, N. Y.; 113
 Newton J. Herrick, as District Attorney of the
 County of Montgomery, N. Y.; Charles R. Weeks,
 as District Attorney of the County of Nassau,
 N. Y.; Joab H. Banton, as District Attorney of
 the County of New York, N. Y.; Burt A. Duquette,
 as District Attorney of the County of Niagara,
 N. Y.; Charles L. DeAngelis, as District Attorney
 of the County of Oneida, N. Y.; Frank P. Malpass,
 as District Attorney of the County of Onondaga,
 N. Y.; Nathan D. Lampham, as District Attorney 114
 of the County of Ontario, N. Y.; J. D. Wilson, Jr.,
 as District Attorney of the County of Orange, N.
 Y.; Wm. H. Munson, as District Attorney of the
 County of Orleans, N. Y.; Don a Colony, as Dis-
 trict Attorney of the County of Oswego, N. Y.;
 Adrian A. Pierson, as District Attorney of the
 County of Orleans, N. Y.; Don A. Colony, as Dis-
 trict Attorney of the County of Putnam, N. Y.;
 Dana Wallace, as District Attorney of the County
 of Queens, N. Y.; Timothy F. Quillinan, as Dis- 115
 trict Attorney of the County of Rensselaer, N.
 Y.; Joseph Maloy, as District Attorney of the
 County of Richmond, N. Y.; Morton Lexow, as
 District Attorney of the County of Rockland, N.
 Y.; William D. Ingram, as District Attorney of
 the County of St. Lawrence, N. Y.; Charles B.
 Andrus, as District Attorney of the County of
 Saratoga, N. Y.; Alexander T. Blessing, as Dis-
 trict Attorney of the County of Schenectady,
 N. Y.; Clyde H. Proper, as District Attorney of 116
 the County of Schoharie, N. Y.; Arthur R. Ellison,
 as District Attorney of the County of Schuyler,
 N. Y.; Leon S. Church, as District Attorney of
 the County of Seneca, N. Y.; Guy W. Chaney, as

- 117 District Attorney of the County of Steuben, N. Y.; LeRoy M. Young, as District Attorney of the County of Suffolk, N. Y.; Henry F. Gardner, as District Attorney of the County of Sullivan, N. Y.; Nathan Turk, as District Attorney of the County of Tioga, N. Y.; Arthur G. Adams, as District Attorney of the County of Tompkins, N. Y.; Frederick G. Traver, as District Attorney of the County of Ulster, N. Y.; Fred M. Beckwith, as District Attorney of the County of Warren,
- 118 N. Y.; Wyman S. Bascim, as District Attorney of the County of Washington, N. Y.; Wilford T. Purchase, as District Attorney of the County of Wayne, N. Y.; Arthur Rowland, as District Attorney of the County of Westchester, N. Y.; Clarence H. Graff, as District Attorney of the County of Wyoming, N. Y.; John T. Knox, as District Attorney of the County of Yates, N. Y., commanding them and each of them, at a certain time therein to be named, and under a certain
- 119 penalty therein to be limited, to be and appear before this Court, there and then to answer unto this complaint, and perform and abide by said order and decree in the premises as to this Honorable Court shall seem meet and be required by the principles of equity and good conscience.

OLIVER D. BURDEN

Solicitor for Plaintiff,

Office and P. O. Address,
914-918 University Bldg.,
Syracuse, N. Y.

UNITED STATES OF AMERICA 121
 WESTERN DISTRICT OF NEW YORK : ss.
 COUNTY OF ERIE

JAMES B. DILLINGHAM, being duly sworn,
 deposes and says:

That he is an officer of the Mutual Benefit
 League of North America, the plaintiff above-
 named, to wit, its President; that he has heard
 read the foregoing complaint and knows the con-
 tents thereof, and that the same is true of his
 own knowledge, except as to the matters therein 122
 stated to be alleged on information and belief,
 and as to such matters he believes it to be true.

JAMES B. DILLINGHAM.

Subscribed and sworn to before me this 9th
 day of June, 1923.

SYLVANUS B. NYE,
Notary Public, Erie County, N. Y.

123

124

125 IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
NEW YORK
IN EQUITY:

JAMES B. DILLINGHAM, as President, SYLVANUS B. NYE, as Vice-President, FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the Mutual Benefit League of North America, operating under an agreement and Declaration of Trust,

126

Plaintiff,

against

GEORGE V. McLAUGHLIN, as Superintendent
of Banks of the State of New York, et al,
Defendants.

UNITED STATES OF AMERICA
WESTERN DISTRICT OF NEW YORK : ss.
COUNTY OF ERIE

127 JAMES B. DILLINGHAM, being duly sworn,
deposes and says:

I reside at 4 Sagamore Terrace, Buffalo, New York, and am an officer, to wit, President, of the Mutual Benefit League of North America, having been **such** President since the organization of the plaintiff on the 28th day of July, 1921, and am now acting as such.

128 The primary object of plaintiff is to loan money to its contract owners to enable them to own homes. In order to create funds with which to make loans, all contract owners make monthly deposits of one per cent of the face value, of their contract, and take turns in borrowing as the money is accumulated. No outside capital is employed,

as the League is simply the medium which brings 129
the co-operators together and enables them to
assist one another. The business of the League
is managed by three trustees. Their work is sub-
ject to the approval and recommendation of an
advisory board of contract owners. Trust or loan
funds, created by the monthly deposits of all con-
tract owners, are loaned only to contract owners
at three per cent annual interest. All loans are
secured by first mortgages on improved real
estate.

130

Contracts are issued in units of any amount
from one hundred dollars up, and are placed in
series of approximately \$140,000.00 total face
value. Each series is entirely separate from all
others and accumulates funds from its own depos-
itors only. Contracts of plaintiff so entered into
with its contract holders are negotiable. The
owner may sell his contract at any time, either
before or after maturity, and if he does not wish
to use a loan himself, he may sell his privilege to 131
borrow to another, thus realizing a profit.

Plaintiff employs directly and indirectly upon
part time and whole time approximately 200
persons, maintains substantial offices in Buffalo
and elsewhere in the State of New York. The
territory served by plaintiff comprises a large
number of counties in the State of New York and
throughout the State. There has been an increase
in its business during the existence of plaintiff,
and the same continues to increase from day to 132
day in amount of moneys handled, number of con-
tracts written, number of loans made, and a con-
tinuous increase in capital, surplus and reserve
fund of plaintiff has occurred.

133 The business and affairs of plaintiff are in a prosperous and growing condition. The plan of operation is fundamentally sound, since it affords to persons who can and will save regularly, the opportunity to pool their funds and to add to the earning power of their savings.

The officers of the plaintiff are amply bonded to the contract holders, and the books and affairs of the plaintiff are regularly audited monthly by a certified public accountant. Under date of April 14, 1923, the following report from such accountant was duly rendered to the plaintiff:

"April 14, 1923.

To the Trustees of the Mutual
Benefit League of North America.
Merritt Building, Pearl Street,
Buffalo, N. Y.

Gentlemen:—

Agreeable to the request of Mr. Dillingham this letter is written in order that you may have in your
135 files a record of our opinion as to the plan of operation of the Mutual Benefit League and the contract issued to those who make application for membership in a series of contracts.

The method of grouping these contracts by series averaging \$140,000.00 each makes it possible to account more easily for the deposits and for the profits thereon and also has the effect of fixing the approximate date of liquidation of that series of contracts.

136 The co-operative plan of operation is fundamentally sound, since it affords the persons who can and will save regularly, the opportunity to pool their funds and to add to the earning power of their savings.

To be profitable, these funds should be administered by men experienced in financial matters but of unquestioned integrity and character. They should be bonded in order that the interests of the depositors be fully protected. These conditions are fulfilled by the Trustees of the League. 137

The contract empowers the trustees to take from the first five installments as an "Expense Fund" four and one half per cent of the face value of the contracts. These amounts so deducted, used for defraying the expense of administering such series until contracts included in that series have been fully paid or liquidated in a manner provided for under one of the several clauses embodied in the contract. 138

Monies distributed from time to time through the Benefit Fund are not taken from the funds of the League but represent cash premiums paid to the League as agents for the owners of the loan rights which have matured, and furthermore, the only persons sharing in the Benefit Fund are those owners of record of the said maturing loan rights, except that the League received ten per cent as provided for in the loan contract. 139

The writer has personally audited the accounts of the League and certifies that all funds received by the trustees are handled in strict accordance with the terms of the contract and that all such funds are properly accounted for.

Very truly yours,

(Signed) Lewis H. Allen, C. P. A. 140

LHA/DH

Vice-President."

I am informed by Counsel and verily believe that the provisions of the purported act of the Legis-

141. lature of the State of New York referred to in the complaint herein, are unreasonable and confiscatory and the enforcement of such statute against plaintiff will deprive it of its property without due process of law; that such statute is in violation of Article 1 of Section 6 of the Constitution of the State of New York; also in violation of Section 10 of Article 1 of the Constitution of the United States in that it impairs the obligation of plaintiff's contractual rights; also in violation of the Fourteenth
- 142 Amendment to the Constitution of the United States, in that the enforcement thereof will deprive the plaintiff and its contract holders of its and their property without due process of law, take their property without just compensation, and deny to plaintiff and its contract holders the equal protection of the law; also said statute absolutely prohibits any individual or a group of individuals from engaging in a private business which, under the terms of said act is admittedly legitimate and
- 143 lawful, and permits corporations to do the very things which, by its terms, individuals are forbidden to do; that said statute, if enforced, constitutes Governmental interference which disturbs the normal adjustment, making, and consummation of legal contracts, legally entered into, and will derange the business of plaintiff, its contract owners and other persons, and actually threatens confiscation of their property.

- 144 That unless plaintiff is permitted to carry out the provisions of its said contracts with its said contract owners, and particularly, to continue its business in accepting repayment of principal and interest upon mortgage, and in accepting payment on contracts already written, and is permitted to

enter into contracts to make loans on real estate, 145
 and to make loans on real estate with moneys of
 contract holders already accumulated, there will be
 an interference particularly with the options ac-
 cruing to contract holders under the provisions of
 Section 6 of the Loan Contract, Schedule "B" an-
 nexed to the complaint, which will result in irre-
 parable loss and damage to the plaintiff and its
 contract owners, and unless plaintiff is permitted to
 carry out its contract, the result will be disastrous
 to plaintiff, depriving it of a reasonable return up- 146
 on its surplus, reserve fund, expense reserve fund,
 and trust fund, accumulated for the benefit of its
 said contract holders, and cause plaintiff to wind
 up and discontinue the business conducted by it.

Affiant is likewise informed and verily believes
 that the provisions of said proposed statute pro-
 hibiting the plaintiff from prosecuting its said
 business are arbitrary and unreasonable and de-
 prives plaintiff of its property without due process
 of law, and amounts to the taking of the property of 147
 plaintiff and its contract owners without compen-
 sation, and is an undue interference with the rights
 and liberty of contract between plaintiff and its
 contract owners, and an attempted prevention of
 business by plaintiff exposes plaintiff to a multi-
 plicity of actions for the recovery of penalties for
 a violation of the statute and of its contracts afore-
 said, and to a multiplicity of proceedings for the
 enforcement thereof, involving its alleged non-
 compliance with the said statute, and with its con- 148
 tract obligations, to the great and irreparable dam-
 age and injury of the plaintiff, for which it has no
 adequate remedy at law or otherwise than herein.

Affiant is likewise informed and verily believes

149 that the defendants or some of them will attempt to enforce or have enforced against plaintiff the said statute, unless they are enjoined from enforcing the same; that plaintiff has no adequate remedy at law against the enforcement thereof, and the injury and damage to plaintiff from its enforcement is and will be irreparable; that unless the defendants be restrained from enforcing the said statute, plaintiff will be subjected to a multitude of actions and proceedings brought to secure its
 150 enforcement. That the penalties and punishments prescribed for its violation are so oppressive and burdensome as to result in the partial destruction and confiscation of the property of plaintiff and its contract owners.

That the amount in controversy herein greatly exceeds the sum of three thousand dollars, exclusive of interests and costs.

Affiant is likewise informed and verily believes that no reason can properly be urged for the destruction of the business of the plaintiff and its contract holders, nor for the enactment of a law similar to that alleged in the complaint herein making it a crime on the part of all parties engaged in such business to conduct the same.
 151

That the business of the plaintiff is one which brings it in contact with many people of small means. That the experience of the plaintiff in the making of its contracts shows that it has provided a method of enforced thrift by monthly savings on the part of those who otherwise would waste the amount of the installments which, under the plan of the plaintiff, they are bound regularly to save under their contract, and ultimately be
 152

brought into a position where they can acquire title 153
to their own homes.

That plaintiff has and does invite inspection on the part of the Banking Department of the State of New York. That it would seem to be the function of said banking department, in a situation of this kind, to propose regulatory laws designed if necessary to adequately protect the investing public, and to provide for suitable inspection and examination such as other legitimate banking and investment enterprises are subjected to; but that 154
the Legislation in question is designed to destroy this industry, and affords no protection to those who have invested in these contracts and who have certain constitutional rights in the property thereunder. That the said legislation carries on its face a discrimination which is not only unconstitutional, but vicious, in that it permits contracts of the sort made by plaintiff, with its contract owners, to be made by people who are sufficiently wealthy to pay instalments of five hundred dollars or over, and 155
that the said legislation denies to the plain people and the poor people of the State of New York, to the man or woman of small means, the same rights and privileges as are attempted and proposed by the same statute to be extended to the rich and wealthy.

JAMES B. DILLINGHAM.

Subscribed and sworn to before me this 9th day 156
of June, 1923.

SYLVANUS B. NYE,

Notary Public, Erie County, N. Y.

157

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE NORTHERN DISTRICT OF
NEW YORK
IN EQUITY

158

JAMES B. DILLINGHAM, as President, SYLVANUS B. NYE, as Vice-President, FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the Mutual Benefit League of North America, operating under an agreement and Declaration of Trust,

Plaintiff,

against

GEORGE B. McLAUGHLIN, as Superintendent of Banks of the State of New York, et al,
Defendants.

	United States of America	} ss.
159	Western District of New York	
	County of Erie	

LEONARD W. H. GIBBS, being duly sworn,
deposes and says:

I am a duly licensed, admitted and practicing attorney and counselor at law of the Supreme Court of the State of New York, residing at the City of Buffalo, Erie County, New York.

160

I am Senator of the State of New York from the Fiftieth District, and have been and am now holding such office.

I am the owner of a contract issued by the Mutual Benefit League of North America, plaintiff herein,

in substantially the form as shown by Schedule B 161
annexed to the complaint in this action, and have
been the owner and holder of such contract since
on or about the commencement of business by the
plaintiff.

Under the provisions of said contract I am inter-
ested as such contract holder in each and every
one of the terms of the same, and particularly in
the provisions of the Trust Fund, Benefit Fund,
Reserve Fund, Surplus Fund, Option in Event of
Death, Option in the Event of Permanent Total 162
Disability, and Benefits to accrue to me under said
contract, and particularly the options on matured
contracts enumerated under Section 6 of said con-
tract with plaintiff.

I regard the act to amend the Banking Law re-
ferred to and set forth in the complaint herein, as
unconstitutional, and believe that its operation if
put in force, and the effect thereof, will be confis-
cation of the property of the plaintiff and of the
contract owners in said Mutual Benefit League of 163
North America.

I have kept in touch with the affairs and the con-
dition of the plaintiff herein, and am further in-
formed by the officers of the plaintiff and verily
believe that since its organization to date, the said
plaintiff has steadily increased its assets until at
the present time it has approximately nine thou-
sand contract owners leagued with it under similar
contracts to that which I hold; that the plaintiff
has on hand and on deposit moneys in trust aggreg- 164
ating or exceeding sixty thousand dollars in
amount; that it has placed in first mortgage loans
at three percent, two hundred and twenty thou-
sand dollars; that the face value of its contracts

165 outstanding among contract holders already leag-
ued approximates the sum of seven million dollars;
and I further understand that the plaintiff has con-
tracted to loan approximately the sum of seven
million dollars to its contract owners at three per
cent when their contracts mature.

I further state that the enforcement of such
statute against plaintiff and its contract owners
will inevitably deprive it and them of its and their
property without due process of law, and deny to
166 it and to them the equal protection of the law,
in that said statute prevents the acts and things
necessary and proper to be done by the plaintiff in
duly performing the terms and conditions of said
contract (Schedule "B") on its part agreed to be
performed.

LEONARD W. H. GIBBS.

Subscribed and sworn to before me this 9th day
of June, 1923.

167 SYLVANUS B. NYE,
Notary Public, Erie County, N. Y.

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE NORTHERN DISTRICT OF
NEW YORK
IN EQUITY

169

JAMES B. DILLINGHAM, as President, SYLVANUS B. NYE, as Vice-President, FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the Mutual Benefit League of North America, operating under an agreement and Declaration of Trust, 170

Plaintiff,

against

GEORGE B. McLAUGHLIN, as Superintendent of Banks of the State of New York, et al,
Defendants.

United States of America
Western District of New York
County of Erie

171

} ss.

FREDERICK A. BALLOU, being duly sworn, deposes and says:

I reside at 61 Ardmore Place, in the City of Buffalo, New York, and am and have been the treasurer of the Mutual Benefit League of North America, since its organization to date. 172

I am familiar with the plan and system of said league and the financial affairs and standing thereof.

- 173 During the period of its existence plaintiff has issued contracts to contract holders to the number of approximately nine thousand. The amount of loans made on first mortgages at three per cent by plaintiff, and still outstanding, approximates \$220,000.00. The aggregate amount represented by contracts already written during the period of the existence of plaintiff, face value, approximates seven million dollars, which amount, when all paid in under the contracts as written will be available
174 for loans to contract owners.

- Plaintiff operating under said agreement and declaration of trust, owns valuable assets, including as aforesaid, first mortgages on real estate approximating \$220,000.00; contracts with contract holders approximating \$7,000,000.00, and also has cash in bank approximating \$75,000.00, and office equipment and supplies of the value of \$15,000.00; and in addition, the good will of its
175 force. Plaintiff has no liabilities.

That no complaint has ever been received from any contract owner since the commencement of plaintiff's business to date.

FREDERICK A. BALLOU.

Subscribed and sworn to before me this 9th day of June, 1923.

SYLVANUS B. NYE,

176 Notary Public, Erie County, N. Y.

To The Mutual Benefit League of North America

Home Office, Buffalo, N. Y.
124 and 126 Pearl Street

OPERATING UNDER AN AGREEMENT AND DECLARATION OF TRUST

I,, being of legal age and in ordinarily good health, hereby apply for and agree to accept one of your 3% Loan Contracts of the Face Value of Dollars (\$.....), in accordance with the terms and conditions as set forth in said Contract. I have paid M....., a solicitor, (\$.....), as initial payment for same, and I agree to pay The Mutual Benefit League of North America hereafter, without notice, a monthly installment on said Contract of Dollars (\$.....), on or before the tenth day of each month following the date hereof until it has matured, or until I have accepted a loan or made a settlement for same under some one of the different options offered under the terms and conditions of said Contract.

I make this application expressly and solely upon the said contract terms which I have read, and not upon the faith of any statement, promise, undertaking or guarantee on the part of said Solicitor or any other person, and I further agree to sign said Contract when presented to me, signed by The Mutual Benefit League of North America.

In witness whereof I have hereunto subscribed my name on the date and at the time written below.

Month..... 19..... Applicant.
Day..... Street address..... P. O. or City.
Hour..... minute..... State or Prov..... County.

THE MUTUAL BENEFIT LEAGUE OF NORTH AMERICA.

By..... Agent.

Next payment is due..... 19.....

Advance payment, \$.....

APPLICATION FOR A 3% LOAN CONTRACT

To The Mutual Benefit League of North America

Home Office, Buffalo, N. Y.
124 and 126 Pearl Street

OPERATING UNDER AN AGREEMENT AND DECLARATION OF TRUST

I,, being of legal age and in ordinarily good health,
hereby apply for and agree to accept one of your 3% Loan Contracts of the Face Value of.....
Dollars (\$.....), in accordance with the terms and conditions as set forth in said Contract. I have paid
M....., a solicitor,, (\$.....), as initial
payment for same, and I agree to pay The Mutual Benefit League of North America hereafter, without notice, a
monthly installment on said Contract of.....Dollars (\$.....), on or before the
tenth day of each month following the date hereof until it has matured, or until I have accepted a loan or made a
settlement for same under some one of the different options offered under the terms and conditions of said Contract.
I make this application expressly and solely upon the said contract terms which I have read, and not upon
the faith of any statement, promise, undertaking or guarantee on the part of said Solicitor or any other person, and
I further agree to sign said Contract when presented to me, signed by The Mutual Benefit League of North America.
In witness whereof I have hereunto subscribed my name on the date and at the time written below.

Month.....19.....Applicant.
Day.....Street address.....P. O. or City.
Hour.....minute.....State or Prov.....County.
THE MUTUAL BENEFIT LEAGUE OF NORTH AMERICA.
By.....Agent.

Next payment is due.....19.....
Advance payment, \$.....

Date of Transfer.....

Date Registered.....

Contract Owner.....

Witness.....

and do hereby constitute and appoint.....attorney to transfer the within Contract on the Books of The Mutual Benefit League of North America, with full power of substitution in the premises.

City, County and State.....

Street Address.....

Name.....

Contract to.....

FOR VALUE RECEIVED.....hereby sell, transfer and assign all.....rights, title, claim, and interest in the within

ISSUE NO. 3
SERIES NO.
CONTRACT NO.



**The Mutual Benefit League
of North America**

HOME OFFICE, BUFFALO, N. Y.

FACE VALUE \$

3% LOAN CONTRACT

ISSUED TO

The following is a true copy of the application for which this Contract is issued.
Ask to see copy of contract applied for and read same before signing application. All applications must be made in duplicate and a copy left with the applicant.
An initial payment of one dollar (\$1.00) is required to be paid on each one hundred dollars (\$100.00) Face Value of the Contract applied for. Contracts will not be issued for an amount less than one hundred dollars (\$100.00).

To THE MUTUAL BENEFIT LEAGUE OF NORTH AMERICA, Home Office: Buffalo, N. Y.
Application for a 3% Loan Contract
124-126 PEARL STREET.
Operating under an agreement and Declaration of Trust.

I,, being of legal age and in ordinarily good health, hereby apply for and agree to accept one of your 3% Loan Contracts of the Face Value of.....Dollars (\$.....), in accordance with the terms and conditions as set forth in said Contract, I have paid M.....dollars
(\$.....), as initial payment for same, and I agree to pay The Mutual Benefit League of North America hereafter, without notice, a monthly installment on said Contract of.....dollars (\$.....), on or before the tenth day of each month following the date hereof until it has matured, or until I have accepted a loan or made a settlement for same under one of the different options offered under the terms and conditions of said contract.
I make this application expressly and solely upon the said contract terms which I have read, and not upon the faith of any statement, promise, undertaking or guarantee on the part of said Solicitor or any other person, and I further agree to sign said Contract when presented to me, signed by The Mutual Benefit League of North America.

IN WITNESS WHEREOF I have hereunto subscribed my name on the date and at the time as written below.

Month.....19..... Applicant.
Day Street Address P. O. or City
Hour..... Minute..... State or Prov.....County.....

THE MUTUAL BENEFIT LEAGUE OF NORTH AMERICA.

TABLE OF VALUES
This Table gives the value for Contracts of \$1000.00 FACE VALUE. For Contracts of larger or smaller values the value is increased or decreased proportionately.

Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6	Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6
Number of Payments.	Amount of Payments.	Amount Credited on loan.	Temporary Loan Value	Cash Surrender Value.	Credit up Value.	Number of Payments.	Amount of Payments.	Amount Credited on loan.	Temporary Loan Value	Cash Surrender Value.	Credit up Value.
1	\$10.00					51	\$510.00	\$510.00			
2	20.00					52	520.00	520.00			
3	30.00					53	530.00	530.00			
4	40.00					54	540.00	540.00			
5	50.00					55	550.00	550.00			
6	60.00					56	560.00	560.00			
7	70.00					57	570.00	570.00			
8	80.00					58	580.00	580.00			
9	90.00					59	590.00	590.00			
10	100.00	\$100.00				60	600.00	600.00			
11	110.00	110.00				61	610.00	610.00			
12	120.00	120.00				62	620.00	620.00			
13	130.00	130.00				63	630.00	630.00			
14	140.00	140.00				64	640.00	640.00			
15	150.00	150.00				65	650.00	650.00			
16	160.00	160.00				66	660.00	660.00			
17	170.00	170.00				67	670.00	670.00			
18	180.00	180.00				68	680.00	680.00			
19	190.00	190.00				69	690.00	690.00			
20	200.00	200.00				70	700.00	700.00			
21	210.00	210.00				71	710.00	710.00			
22	220.00	220.00				72	720.00	720.00			
23	230.00	230.00				73	730.00	730.00			
24	240.00	240.00				74	740.00	740.00			
25	250.00	250.00				75	750.00	750.00			
26	260.00	260.00				76	760.00	760.00			
27	270.00	270.00				77	770.00	770.00			
28	280.00	280.00				78	780.00	780.00			
29	290.00	290.00				79	790.00	790.00			
30	300.00	300.00				80	800.00	800.00			
31	310.00	310.00				81	810.00	810.00			
32	320.00	320.00				82	820.00	820.00			
33	330.00	330.00				83	830.00	830.00			
34	340.00	340.00				84	840.00	840.00			
35	350.00	350.00				85	850.00	850.00			
36	360.00	360.00				86	860.00	860.00			
37	370.00	370.00				87	870.00	870.00			
38	380.00	380.00				88	880.00	880.00			
39	390.00	390.00				89	890.00	890.00			
40	400.00	400.00				90	900.00	900.00			
41	410.00	410.00				91	910.00	910.00			
42	420.00	420.00				92	920.00	920.00			
43	430.00	430.00				93	930.00	930.00			
44	440.00	440.00				94	940.00	940.00			
45	450.00	450.00				95	950.00	950.00			
46	460.00	460.00				96	960.00	960.00			
47	470.00	470.00				97	970.00	970.00			
48	480.00	480.00				98	980.00	980.00			
49	490.00	490.00				99	990.00	990.00			
50	500.00	500.00				100	1000.00	1000.00			

OF VALUES

VALUE. For Contracts of larger or smaller face value the amount

Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6
Number of Payments.	Amount of Payments.	Amount Credited on loan.	Temporary Loan Value	Cash Surrender Value.	Paid up Certificate Value.
51	\$510.00	\$510.00	\$245.50	\$399.00	\$491.00
52	520.00	520.00	251.00	408.00	502.00
53	530.00	530.00	256.50	417.00	513.00
54	540.00	540.00	262.00	426.00	524.00
55	550.00	550.00	267.50	435.00	535.00
56	560.00	560.00	273.00	444.00	546.00
57	570.00	570.00	278.50	453.00	557.00
58	580.00	580.00	284.00	462.00	568.00
59	590.00	590.00	289.50	471.00	579.00
60	600.00	600.00	295.00	480.00	590.00
61	610.00	610.00	300.50	489.00	601.00
62	620.00	620.00	306.00	498.00	612.00
63	630.00	630.00	311.50	507.00	623.00
64	640.00	640.00	317.00	516.00	634.00
65	650.00	650.00	322.50	525.00	645.00
66	660.00	660.00	328.00	534.00	656.00
67	670.00	670.00	333.50	543.00	667.00
68	680.00	680.00	339.00	552.00	678.00
69	690.00	690.00	344.50	561.00	689.00
70	700.00	700.00	350.00	570.00	700.00
71	710.00	710.00	355.00	579.00	710.00
72	720.00	720.00	360.00	588.00	720.00
73	730.00	730.00	365.00	597.00	730.00
74	740.00	740.00	370.00	606.00	740.00
75	750.00	750.00	375.00	615.00	750.00
76	760.00	760.00	380.00	624.00	760.00
77	770.00	770.00	385.00	633.00	770.00
78	780.00	780.00	390.00	642.00	780.00
79	790.00	790.00	395.00	651.00	790.00
80	800.00	800.00	400.00	660.00	800.00
81	810.00	810.00	405.00	669.00	810.00
82	820.00	820.00	410.00	678.00	820.00
83	830.00	830.00	415.00	687.00	830.00
84	840.00	840.00	420.00	696.00	840.00
85	850.00	850.00	425.00	705.00	850.00
86	860.00	860.00	430.00	714.00	860.00
87	870.00	870.00	435.00	723.00	870.00
88	880.00	880.00	440.00	732.00	880.00
89	890.00	890.00	445.00	741.00	890.00
90	900.00	900.00	450.00	750.00	900.00
91	910.00	910.00	455.00	759.00	910.00
92	920.00	920.00	460.00	768.00	920.00
93	930.00	930.00	465.00	777.00	930.00
94	940.00	940.00	470.00	786.00	940.00
95	950.00	950.00	475.00	795.00	950.00
96	960.00	960.00	480.00	804.00	960.00
97	970.00	970.00	485.00	813.00	970.00
98	980.00	980.00	490.00	822.00	980.00
99	990.00	990.00	495.00	831.00	990.00
100	1000.00	1000.00	500.00	840.00	1000.00

SCHEDULE "B"



IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK 177

JAMES B. DILLINGHAM, as President, SYLVANUS B. NYE, as Vice-President, FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the Mutual Benefit League of North America, operating under an agreement and Declaration of Trust,

Plaintiffs, 178

against

GEORGE V. McLAUGHLIN, as Superintendent of Banks, of the State of New York, et al,
Defendants.

The joint and several answer of George V. McLaughlin, as Superintendent of Banks of the State of New York, and Carl Sherman, as Attorney-General of the State of New York, to the Bill of Complaint herein, admits, denies and alleges as follows:

179

I. We are without knowledge of the truth or falsity of the allegations contained in the paragraphs of the Bill of Complaint herein marked "First," "Second," "Third," "Fourth," and "Fifth," and that upon any application for an interlocutory injunction, a continuance of the stay granted herein and upon the trial we shall hold the plaintiffs to strict proof of such allegations.

II. We admit the allegations contained in the paragraph of the Bill of Complaint herein marked "Sixth." 180

III. We deny the allegations contained in the paragraphs of the Bill of Complaint herein marked "Seventh" and "Eighth."

181 IV. Further answering the complaint herein,
 we admit that so far as we are empowered and
 directed by law, we shall as Superintendent of
 Banks and Attorney-General, respectively, enforce
 the provisions of Section 174 of the Banking Law,
 and that said Section 174 of the Banking Law is a
 valid and constitutional law of the State of New
 York, and the plaintiffs and their associates since
 its enactment and at the present time have been
 violating it and are subject to prosecution under
 it.

182 V. We are without knowledge of the truth or
 falsity of the allegations in the Bill of Complaint
 herein to the effect that each of said plaintiffs
 resides in and is a citizen of the State of New York,
 and that at least one of them is a resident in the
 Northern District of New York, and that upon any
 application for an interlocutory injunction, a con-
 tinuance of the stay granted herein and upon the
 trial, we shall hold the plaintiffs to strict proof of
 such allegations.

183

CARL SHERMAN,

Attorney-General of the State of
 New York, and attorney for George
 V. McLaughlin, as Superintendent
 of Banks, of the State of New York,
 and appearing in his own behalf by
 Edward G. Griffin, Deputy Attor-
 ney-General,

184

Office and Post Office Address,
 Capitol, Albany, N. Y.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss: 185
CITY OF NEW YORK }

GEORGE V. McLAUGHLIN being duly sworn
deposes and says:

That as Superintendent of Banks of the State of
New York he is one of the defendants herein; that
he has read the foregoing answer and knows the
contents thereof and that the same is true in sub-
stance and in fact. 186

Sworn to before me this 21st day of June, 1923.

GEORGE V. McLAUGHLIN.

PHILIP CRAN,

Notary Public, New York County No. 119,
New York County Register's No. 5057,

My Commission expires March 30th, 1925.

187

188

189 STATE OF NEW YORK
COUNTY OF ALBANY
CITY OF ALBANY

} ss:

EDWARD G. GRIFFIN being duly sworn
deposes and says:

That he is Deputy Attorney-General of the State
of New York and appears herein upon behalf of
the Attorney-General of the State of New York;
that he had read the foregoing answer and knows
190 the contents thereof and the same is true in sub-
stance and in fact.

EDWARD G. GRIFFIN.

E. A. GIFFORD,

Notary Public, Greene County, N. Y.

Certificate filed in Albany County, N. Y.

Sworn to before me this 23rd day of June, 1923.

191

192

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

JAMES B. DILLINGHAM, as President, SYLVANUS B. NYE, as Vice-President, FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the Mutual Benefit League of North America, operating under an agreement and Declaration of Trust,

Plaintiff, 194

against

GEORGE B. McLAUGHLIN, as Superintendent of Banks of the State of New York, et al,
Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

GEORGE V. McLAUGHLIN, being duly sworn, 195
deposes and says:

That he is Superintendent of Banks of the State of New York, duly qualified and acting as such, and has been since July 1st, 1920.

That he has read the Order to Show Cause, temporary restraining orders, application for an interlocutory injunction, bill of complaint, and affidavit herein, and knows the contents thereof.

The history of the legislation complained of in this suit is as follows:

Chapter 895 of the laws of 1923 added section 174 to the Banking Law, and was introduced by Senator Lowman in the Senate on April 4th, 1923. The bill was passed May 2nd in the Senate and was passed May 5th in the Assembly. It remained 196

197 before the Governor until June 1st when he
 approved it. In the meantime, hearings upon the
 bill before both the Senate and Assembly Banks
 Committees were held, and on May 23rd a hearing
 was held before the Governor. At such time repre-
 sentatives of the 3 and 4% loan "trusts" appeared
 and were heard at great length, and filed briefs
 containing all of the matter in support of their
 opposition, set up in the moving papers herein.
 The bill was passed in the both houses of the legis-
 198 lature with only a few dissenting votes.

Schedules A and B, attached to the moving
 papers (which are the so-called applications and
 contract of the plaintiff) show that the contract on
 its face holds out to the subscriber that he will get
 a loan at the rate of interest of 3% and that the
 contract affords a means of encouraging thrift,
 investment and building of a home.

An analysis of the contract, based on the assump-
 tion that all contract holders will continue to make
 199 all the payments required under the terms of the
 contract, and remain holders of the contract for the
 duration of the trust without forfeiting any part of
 their payments, reveals the fact that only a small
 number of holders of contracts in any series will
 be able to borrow at any such rate of interest
 because of the fact that there will not be sufficient
 moneys in the trust fund to admit of the making of
 the loans until after a long period of time has
 expired. Further, if interest is allowed on payments
 200 made by the contract holders during this period of
 time at the usual rate of interest paid by savings
 banks of this State, the cost of the loan in the case
 of contract holder No. 50 will be equal to 5.4%, and
 each contract holder with a number over 50 and

up to 100 will pay a correspondingly increased rate of interest due to the fact that each such contract holder must wait a longer period of time and for this period of time enjoys no interest on the deposits made under the contract. Following this through, it is found that the holder of contract No. 100 will have paid in eighty-one payments of \$10. each, aggregating \$810., and at this time he will be entitled to a \$1000. loan, but as the contract holder has already paid in \$810., the plaintiff will, in fact, only be loaning him \$190. A computation of the interest, allowing to the holder the usual rate of interest paid by savings banks on the monthly deposits which he has made, would show that he is paying an equivalent of 61% of interest on the amount of money that the plaintiff is loaning to him. Following out the same method of computation for the contracts that bear numbers of over 100, it will be found that the last numbered contracts pay even more than 61%. For instance, in the case of contract number 140, the holder will only receive his money back, and the "trust" will have had the use of it for a long period of time even after he had made his last payment.

The literature and contract show that it is an appeal to the class of individuals recognized as small savers, holding out to them a means of getting assistance for home building at a rate of interest far below what they can get from any banking institution.

The above facts show that this rate of interest instead of being low, may be regarded as usurious.

Bearing in mind that the appeal is made to the individual commonly referred to as a small saver, consideration should be given to the cash surrender

205 tables which appear on the back of Schedule B. It is recognized that in every group of small savers, there is a fair percentage who for many good reasons cannot promptly make periodical payments, and, therefore, have to turn to the banking institution or the individuals entrusted with their funds to withdraw the same or cash in and surrender the contract.

Schedule B shows that an individual who has made fourteen payments of \$10. each on account of
 206 a \$1000. contract, which in the aggregate would amount to \$140., would not be entitled to a return of any part of the \$140. so paid. His right to a cash surrender value does not start until after he has made fifteen payments and then is only 50% of what he has paid. The other options to which the contract holder may be entitled under this schedule, afford very little relief to a contract holder so situated that he cannot continue his payments. None of them carry any positive promise
 207 that he can receive any cash, and even the cash surrender after the fifteenth payment is made dependent upon a number of conditions which are recited in Section 14 of the contract, known in these papers as Schedule B. One of these conditions is that not more than one-quarter of the monthly receipts of the trust fund of any series in any one month may be used for cash surrenders and temporary loans. It is obvious that there is no certainty that the contract holder may have his contract redeemed by the payment of cash. It is this
 208 situation that discourages the contract holders after they have made a considerable number of payments, and leads them to completely abandon their contracts. In some cases brought to the

deponent's attention, this has been an entire loss 209
of their savings.

The contract is governed by a declaration of trust on file with the County Clerk, and an examination of the form of declaration of trust used generally by these "trusts" provides that there shall be no personal liability on the part of the organizers of the trust or the trustees, and the trustees have unlimited power and right to dispose of the property of the trust and shall not be accountable in any case for their own acts, neglects or defaults, 210
or for any agent employed by them or other person into whose hands any deposit of money or securities may come.

There is no initial capital beyond the nominal sum (in most cases not exceeding \$1000.) which is paid in and all of the other moneys come from the contract holders, whose funds it is apparent are not afforded sufficient protection.

Deponent states that before proposing the legislation complained of by the plaintiff, a study was made of the question, and an examination into the methods adopted by other states in handling the problem. 211

Deponent found that the following states have prevented the operations of these companies under "Blue Sky" legislation or otherwise: Wisconsin, West Virginia, Virginia, Vermont, Utah, Tennessee, Rhode Island, North Carolina, Maine, Louisiana, Illinois, District of Columbia.

Deponent is further informed and believes that 212
Missouri and Texas, which have attempted regulation of these companies by law, have found such regulation impractical, and have repealed same.

In the case of Texas, deponent is informed and

- 113 believes that this state for a period of time encouraged the development of these "trusts" and as a result, they grew to considerable proportions, but the evils were such that the state, after careful consideration and study of the subject, repealed this statute and such trusts are now barred from the state.

- Deponent is further informed and believes that Pennsylvania has a so-called regulatory law and that it had under supervision the Co-Operative
- 114 League of America, which operated extensively in Pennsylvania and other states in the Union, including New York State. That this trust is apparently unable to meet its obligations and the trustees without any notice to its contract holders, removed its property from the State of Pennsylvania and the supervising powers there have advised the contract holders that they are without power to give them relief. The contract holders of this League, which is organized on practically the same
- 115 basis as the plaintiff, are now being offered in lieu of their payments made on their contracts, stock of a mortgage company, which stock has been barred from sale by the Securities Commission of the State of Ohio.

- As a result of these companies being prevented from carrying on their operations in all of these states, after they made investigations and because of the recent ruling of the Comptroller of the Currency holding that they must incorporate if they
- 216 want to continue business in the District of Columbia, all of these so-called "trusts" have sought refuge in the State of New York because we had no law prohibiting their operations.

These 3 & 4% loan "trusts," including the com-

plainant herein, are attempting to do a business 217
 similar to that of a savings and loan association.
 Proper regulation and supervision of savings and
 loan associations has for many years been provided
 for in the Banking Law, but the plaintiff herein
 and other companies doing a similar business are
 unable to bring themselves within the salutary pro-
 visions of that statute. Their contracts are com-
 plex and impracticable of fulfillment within the
 representations indicated on the face of the con-
 tract. The contract holder in this particular case 218
 is required to state over his signature that he has
 read this long and complex instrument and is not
 allowed to rely upon any statement or promise,
 undertaking or guaranty made by any solicitor or
 other person employed by the company. It is a
 well-known fact that this form of loan appeals to
 persons of small property and business experience
 who can not usually understand so difficult an in-
 strument, and as a result, they are led into the ex-
 ecution of the contract believing that they have 219
 something which is similar in form and nature to
 that offered by a savings and loan association, but
 with an added feature - that they will be able to
 borrow money at a low rate of interest.

Deponent is of the opinion that none of these so-
 called 3% "trusts" are solvent on a liquidation
 basis. In this he is confirmed by all banking associ-
 ations, chambers of commerce and associations
 formed for the purpose of protecting the invest-
 ment public, who have examined into the question. 220

With the knowledge of these facts hereinbefore
 set forth, and knowing that the plan of the plain-
 tiff may be stated as being exactly the same as
 these older "trusts," deponent is of the opinion

- 221 that the only safe way for this business to be conducted is to conform to the provisions of the Banking Law, and the various sections which now provide for savings and loan associations, investment corporations, mortgage companies, personal loan companies, in addition to trust companies, savings banks, and private bankers, and those desiring to carry on a loan business of this character should follow these provisions of the Banking Law which have been tried and tested and found adequate to
- 222 meet the purpose of their organizers and at the same time afford adequate protection to the depositors and shareholders who are entrusting their funds to them.

- The plaintiff's plan of business and that of other similar "trusts" is nothing but an adaptation of the old national building and loan associations which had these same elements of chance and which resulted in the loss of millions of dollars to their shareholders, and whose operations have long since been prohibited in all states of the Union. Our
- 223 Banking Law, as it exists today, was adopted with the idea of meeting the situation that arose by reason of these national building and loan associations, and the law which the plaintiff seeks to have declared unconstitutional was enacted for the purpose of meeting this new situation brought on by these so-called 3 and 4% loan "trusts". It is for the purpose of meeting an old evil which has come forward in a new form.

GEORGE V. McLAUGHLIN.

- 224 Sworn to before me this 21st day of June, 1923.
PHILIP CRAN

Notary Public, New York County No. 119
New York County Register's No. 5057
My commission expires March 30th, 1925.

IN THE UNITED STATES DISTRICT COURT 225
FOR THE NORTHERN DISTRICT OF
NEW YORK

JAMES B. DILLINGHAM, as President; SYLVANUS B. NYE, as Vice-President; FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the Mutual Benefit League of North America, operating under an agreement and declaration of trust,

vs

226

GEORGE V. McLAUGHLIN, as Superintendent of Banks of the State of New York and CARL SHERMAN, as ATTORNEY GENERAL of the State of New York.

STATE OF NEW YORK
COUNTY OF ERIE
CITY OF BUFFALO

} ss:

JAMES B. DILLINGHAM, being duly sworn, 227
says: that he is the President and one of the three trustees of the Mutual Benefit League of North America, plaintiff herein; that he is informed by counsel herein from a study of the Banking Law of the State of New York, and verily believes that the following are the main reasons why the Mutual Benefit League of North America cannot operate under the provisions of the Banking Laws of the State of New York relating to savings and loan associations, to wit:

228

1. That there is a fundamental basic distinction and difference between an organization which operates by contract and through contractual relation with its contract owners, as in the case of the Mut-

229 ual Benefit League of North America, and a savings and loan association which operates similar to a bank or banking institution and which is governed by the implied contractual relation only there created, in that such said savings and loan associations are mere custodians of the monies.

2. The Mutual Benefit League of North America is a league of contract owners leagued together by the mutuality of their contract.

230 3. The contract of the Mutual Benefit League of North America with its contract owners provides that it can only lend to *its* contract owners, (See paragraph Two of the contract). The only monies that can come in are from contract owners.

4. The contract owners by contract are entitled to borrow back all the money available for loans.

When a series of contracts is completed all of the money is distributed to the contract owners, and there is no money available to lend to an outsider, not a contract owner.

231 5. The only manner in which the Mutual Benefit League of North America can loan to anyone outside a contract owner is to sell his rights under his contract, and the buyer thereupon becomes a contract owner. The declaration of trust and the contract of the Mutual Benefit League of North America does not permit it to have money on deposit subject to withdrawal on demand.

On the other hand the operations of a savings and loan association are as follows, to wit:

232 1. It does not operate under a contract in writing, but issues shares. Its members are not bound together or leagued together by contract in writing, but are shareholders.

2. **MUTUAL SAVINGS AND LOAN ASSO-** 233
CATIONS are permitted to make loans to share-
 holders, stockholders, or to outsiders who may of-
 fer approved security.

3. **MUTUAL SAVINGS AND LOAN ASSO-**
CATIONS have monies on deposit subject to
 withdrawal on demand.

4. The only similarity between the Mutual
 Benefit League of North America and Mutual Sav-
 ings and Loan Associations as defined by the Laws
 of the State of New York, is that each of them re- 234
 ceive regular or periodical installments and each
 of them loan money on first mortgages on real
 estate, but both functions are those which are com-
 mon to many other legal entities, such as banks,
 mortgage companies, real estate writers, invest-
 ment brokers, installment houses, etc., but they are
 entirely dissimilar in their several operations and
 inducements which they hold out to depositors and
 attract deposits. In short, the plan of the Mutual
 Benefit League of North America, this plaintiff,
 constitutes a perfectly legal valid contractual ar- 235
 rangement, *which is entirely different from all*
other plans offered to investors.

II

Answering the affidavit of George V. McLaugh-
 lin, Superintendent of Banks of the State of New
 York, verified June 21, 1923, affiant refers to the
 same in its entirety as inaccurate, based upon mis-
 information and lack of study, not only of contracts
 of this plaintiff, but also of the results to be 236
 obtained therefrom as follows:

FIRST: Annexed hereto and marked "Schedule
 B," and made a part hereof is a chart prepared by
 certified public accountants showing the workings

237 of a series of one hundred forty One Thousand Dollar (\$1,000.00) contracts. This chart (Schedule B) proves that the plan of the plaintiff is mathematically accurate, financially sound and possible of fulfillment under the worst possible conditions, for example:

(a) The chart takes into consideration only one source of profit to the trust fund, i.e., the three per cent interest on the real estate mortgages created by the series during the life of the series.

238 (b) This chart also shows withdrawals of the maximum amount of expense permitted under the contract.

(c) This chart shows the three per cent interest to exceed the maximum amount of expense permitted to be withdrawn under this contract.

239 (d) That the profits to a trust fund of a series are contributed from seventeen various sources, such as, interest on bank balances; temporary loans on their contracts at six per cent interest; ten per cent of the bonus paid to contract owners from the sale of their loan privileges; non-participating certificates bearing two per cent; participating certificates bearing no interest; transfer fees of One Dollar each on each One Thousand Dollar contract; together with all the other sources of income provided by the contract.

240 Inasmuch as the only source of profit shown in this chart, (Schedule B) is the three per cent interest, viz: Seventy-six Hundred Ninety-six Dollars (\$7,696.00), and the maximum expense permitted under the contract, viz: Sixty-three Hundred Dollars (\$6,300.00) is withdrawn and the plan is still financially workable with profits to its contractors, it must be assumed that with sixteen other sources

of profit contributing, the plan is attractive to the contract owners. 241

Inasmuch as the expense fund amounts to only Forty-five Dollars (\$45.00) on each One Thousand Dollar (\$1,000.00) contract over a period of ten to twelve years, the deduction is that this amounts to only three-eighths of one per cent of the money handled per annum.

SECOND: The affidavit of George V. McLaughlin, hereinbefore referred to shows a complete lack of understanding of the plan of the plaintiff. The deductions of said Superintendent purports to be based on the chart prepared by the accountants of the plaintiff, but the deductions so drawn are misleading and inaccurate. He says, for instance, (Folio 5) "Only a small number of holders of contracts in any series will be able to borrow at any such rate of interest because of the fact that there will not be sufficient moneys in the Trust Fund to admit of the making of the loans until after a long period of time has expired". In answer, affiant shows that the contract of plaintiff says (Section 6, Line one) "When a sum of money equal to the Face Value of the contract shall have been accumulated in the Trust Fund provided that all prior contracts in this series shall have been satisfied, this contract shall mature". 242 243

The Chart, (Schedule B) shows when these conditions will have been complied with and what month the money that will be available for each contract has been accumulated. 244

THIRD: The Superintendent of Banks says (Folio 5) "The cost of the loan in the case of contract number 50 will be equal to 5.4 per cent". This statement is inaccurate and incorrect, the

245 proof being that the chart of plaintiff, (Schedule B), shows that, considering only one of the seventeen sources of profit, i.e., the three per cent interest, the contract number 50 will mature in forty-two months and after \$420.00 has been paid in.

The contract holder would then exercise option E under Section 6 of the contract.

Based on the last transaction of the League under Section 4 of the contract known as Benefit Funds, and assuming that contract holder number 246 50 would exercise option E, Section 6, he would have invested \$420.00.

The profit derived from the Benefit Fund would have been \$589.13 and he would be entitled to receive a check for the \$420.00 invested, plus the profit so earned, \$589.13 or \$1,009.13. In this case he would not have to borrow as he would have over \$1,000.00 which belongs to him without borrowing at all.

247 The affiant further says that the last transaction upon the books of the plaintiff, referred to, was completed as follows:

On May 26th, 1923, Herman and Catherine Folker of Rochester, New York, the owners of a certain building in the City of Rochester paid the sum of \$6,300.00 to the contract holders who had matured, for their rights to borrow a sum in the aggregate amounting to \$25,958.00 at three per cent interest. Ten per cent of the \$6,300.00 was placed in Reserve Fund (see Section 4, Line 4 of the contract).

248 The contract holders' total investment was \$4,042.00, the prorated profit distributed to them was \$5,670.00 (\$6,300.00 less 10 per cent placed in Reserve); so that each \$10.00 invested earned a profit of \$14.02 or a total return check of \$24.02 for

each \$10.00 invested. Had contract holder number 249 50 matured during the month of May, 1923, and had he received the return as contract holders did receive, whose contract did mature during the month of May, 1923, he would have received \$1,009.13 for his investment of \$420.00 invested over a period of forty-two months, or an average period of 21 months.

FOURTH: The Superintendent McLaughlin further says (Folio 6) "Following this through it is found that contract holder number one hundred 250 will have paid in eighty-one payments of \$10.00 each. A computation would show that he is paying an equivalent of 61 per cent of interest on the amount of money that the plaintiff is loaning to him."

In answer, affiant says: That based on the transaction of May 26, 1923, above referred to, contract owner number 100 would receive a profit of \$1,-136.19 on his investment of \$810.00, or a total check of \$1,946.19. It would be unnecessary to borrow in 251 lieu of this attractive option.

In the case of contract owner number 140; The chart (Schedule B) shows that at the end of one hundred months, nineteen contract owners would find themselves in the position of having paid one hundred times. Inasmuch as this chart (Schedule B) takes into consideration only one source of profits and there are sixteen other sources of profits which contribute to the Trust Fund making the money available for maturing contracts much fast- 252 er than this chart shows, it is reasonable to assume that there would not be nineteen paid up contracts at the end of one hundred months. The experience table of the League shows that there would not be

253 any paid up contracts at that time but that all contracts including the 140th contract would have matured previous to this time and the contract holder would have exercised one of the options under section six of the contract with profit to himself.

FIFTH: In answer to the remarks of the Superintendent of Banks in reference to literature and advertising the contention of plaintiff is that the same tells the truth, the whole truth and nothing but the truth; that, conservatism is practised,
 254 so far as this plaintiff is concerned and that each and every piece of literature used is passed upon by a Board of Legal Censors.

SIXTH: Referring to the remarks of the Superintendent of Banks in his affidavit, regarding cash surrender and grace privileges under the contract of plaintiff (Folio 8), it is submitted that a careful study of Schedule B will show that the League is as liberal with the contract holder, who is unable to keep up his payments as it possibly could
 255 be without penalizing the other numbers of series and without placing a premium on lapsation. It is further submitted, that cash surrender and grace privileges under the League contract in Schedule B are more liberal than similar options under policies written by standard, Old Line Life Insurance Companies, with their policy holders, and comparison is invited.

Affiant claims there is no other concern "similar" to the Mutual Benefit League of North America. That no contract holder of plaintiff need lose
 256 a penny and challenges the Superintendent of Banks to produce one who has lost a penny in dealings with the plaintiff.

SEVENTH: Inasmuch as the Superintendent

of Banks and the Attorney General of the State 257
 of New York admitted upon the first argument
 herein on June 25th, 1923, at Albany, New York,
 in the presence of affiant, that they had never read
 a copy of the Declaration of Trust of the Mutual
 Benefit League of North America, the allegations
 in Sections 12 and 13 of the affidavit of the Super-
 intendent of Banks are challanged as unfair, un-
 reasonable and not applicable to this League. The
 reference in said affidavit at Folios 14, 15, 16 and
 17 refers to concerns which are unlike the plaintiff, 258
 and do not apply to this plaintiff in any event.

EIGHTH: The Superintendent of Banks (Folio
 17) says: "These three and four per cent loan
 "Trusts" including the complainant herein are at-
 tempting to do a business similar to a Savings and
 Loan Association". In answer affiant says that
 former Attorney General Newton ruled that the
 business of the Mutual Benefit League of North
 America is not similar to that of a Savings and
 Loan Association. The distinction between the 259
 business of the plaintiff and that of a Savings and
 Loan Association, under New York Laws, has al-
 ready been pointed out in this affidavit. And in
 addition it is pointed out that the reason the plain-
 tiff is unable to bring itself under the regulations
 relating to Savings and Loan Associations of New
 York State, is, that it is dissimilar in operation,
 in cause and effect, in incentives to contract owners
 and in almost every other particular. It is either
 pure laziness or unwillingness of mind on the part 260
 of officials to say that the plaintiff cannot be reg-
 ulated or classified. Under the Banking Law of
 their State, Pennsylvania, California and perhaps
 other States have already passed such statutes re-

- 261 cognizing their constitutional duty to small investors as contra-distinguished from the rich and wealthy. This plaintiff has been begging at the Legislative Hall at Albany for classification and regulation. Its contract owners and it objects to being slandered or destroyed, and insist that their contract is practical of fulfillment within the representations indicated on the face of the contract, and, moreover, that its contracts are being fulfilled every day to date, absolutely. If the business of plaintiff were similar to that of a Savings and Loan Association under the Laws of the State of New York, why is it necessary to pass this law? The caption of this amended section says plainly that it is an act "In relation to encroachment of individuals and trustees or otherwise upon the powers of private Banks, Savings Banks or Savings and Loan Associations".
- 262

- NINTH : The Superintendent of Banks says (Folio 5) "The contract holder in this particular case is required to state over his signature that he has read this long and complex instrument, etc". It is submitted that common-sense requires the reading of any contract; that if the contract of plaintiff is not fair it could be overruled by the Superintendent of Banks and the various officials of the State of New York the same as an insurance policy or other similar document. It would take a little work perhaps on the part of these State officials, but it is submitted that the contract is fair and while it may be capable of improvement the plaintiff is willing to be enlightened and to comply with legal regulations.
- 263
- 264

TENTH: In answer to the statement of the Superintendent of Banks (Folio 19) "That he is

of the opinion that none of these three per cent trusts are solvent on the liquidation basis," it is submitted that in his next sentence he admits that he has not personally examined into the question but relies upon Chambers of Commerce and other Agencies rather than upon the suggestion of this plaintiff heretofore referred to, to pay all of the reasonable expenses of all accounts he desired to hire for the purpose of auditing plaintiff's books. That plaintiff is ready to prove upon the trial here-in or prior to that time that the Superintendent of Banks is not only wrong but absolutely unfair in this assumption.

ELEVENTH: It is finally submitted that it would be impossible as to the contract of plaintiff to so change its business that it could be a Savings and Loan Association, owing to the entire dissimilarity of the two kinds of business, but it is submitted that it would not be impossible to so add to the Banking Law of the State of New York as to so regulate and classify the business of the plaintiff as not to destroy it. The plaintiff offers to help and assist in having an amendment to the Banking Laws which would absolutely regulate it and its business and has already attempted to do everything in its power to bring about this result. It welcomes regulation, but it does not welcome extermination.

Under the facts herewith submitted together with the affidavit of Lewis H. Allen, herewith submitted, covering the complete statement, suggested by the Constitutional Court on June 25th, 1923, an interlocutory injunction in the form of a tempor-

269 any restraining order is prayed for to extend until
final decree herein.

JAMES B. DILLINGHAM.

Sworn to before me this 2nd day of July, 1923.

W. B. WEAVER,
Notary Public, Erie County.

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IN THE UNITED STATES DISTRICT COURT 273
FOR THE NORTHERN DISTRICT OF
NEW YORK

JAMES B. DILLINGHAM, as President, SYLVANUS B. NYE, as Vice-President, FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the Mutual Benefit League of North America, operating under an agreement and Declaration of Trust,

Plaintiffs, 274

against

GEORGE V. McLAUGHLIN, as Superintendent of Banks, of the State of New York, et al,
Defendants.

STATE OF NEW YORK
COUNTY OF ERIE
CITY OF BUFFALO

} ss:

LEWIS H. ALLEN, being duly sworn, says: 275

1. I reside in the Town of East Aurora, N. Y., and am and have been for some years a certified public accountant under the Laws of the State of New York, and am Vice-President of Albrecht & Weaver, Inc., of 325 Fidelity Building, Buffalo, N. Y.

2. I have had personal charge of the auditing of the affairs of the Mutual Benefit League of North America since its inception.

3. At the inception of my employment by the Mutual Benefit League of North America I made a thorough study of the plan covered by its declaration of trust and the contract of the Mutual Benefit League of North America with its contract own- 276

277 ers and devised the bookkeeping system used by the plaintiff in its business from its inception to date, from which I am able to make an actuarial deduction as to the exact condition of each and every contract in each and every series written by it and now in existence.

4. I hereby refer to and repeat all that was said in my affidavit which is set forth in the complaint herein at pages 34 and 35 of the bill of complaint.

278 5. The Mutual Benefit League of North America has since its inception written fifty series of contracts of approximately One Hundred Forty Thousand (\$140,000.00) each, of which a small number have not been in existence a sufficient time in order to permit the contract owners to demand non-participating certificates or cash surrender value, and as to those series at this date there are comparatively few lapses so that the amount required to refill the same would be nominal.

279 6. Hereto annexed, marked "Schedule A" and made a part hereof, is a true and correct statement of the condition of each and every series upon which four months installments have been paid which have reached the stage of contributing to trust fund monies. In answer to and refutation of the alleged sworn statements of George V. McLaughlin in his affidavit (at folios 5 to 8) herein, verified June 21st, 1923, affiant shows:

280 (a) An analysis of the contract of plaintiff demonstrates that monthly payments of one per cent of the face value are required and that in an average series this results in a Trust Fund Accumulation of approximately \$1,400. per month; this means that a fair and reasonable number of

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contracts of the contract holders, mature each year, 281
 hereby carrying out the terms of the contract.

(b) Referring to the statement "the cost of the
 loan in the case of contract holder number 50 will
 be equal to 5.4 per cent," affiant says, that if the
 contract holder number 50 elects to borrow the
 \$580.00 which he is entitled to borrow under his
 contract, the annual interest rate on the loan of this
 amount is 2.3 per cent, instead of 5.4 per cent. This
 interest rate of 2.3 per cent is calculated on the
 entire amount of loan until it is finally paid, under 282
 the terms of the contract.

(c) It is incorrect for said Superintendent to
 deduce the result, (by any method of computation,
 that "The last numbered contracts of a series pay
 even more than 61 per cent". This computation
 is inaccurate. In all events the contract holder has
 several options which may be figured showing re-
 sults to his advantage from an actuarial stand-
 point.

(d) Referring to the statements contained in 283
 said affidavit of said Superintendent of Banks at
 the end of folio 7 thereof it is sufficient to point out
 that Schedule B is based upon the most conserva-
 tive method of calculating the profit to the contract
 holders of each series, and while it is impossible to
 calculate the amount of income which may be earn-
 ed for the Trust Fund of any particular series the
 above deduction is unwarranted, in that the same is
 based upon no actuarial facts in the hands of said
 Superintendent of Banks or those of his account-
 ants. 284

LEWIS H. ALLEN, C. P. A.

Sworn to before me this 2nd day of July, 1923.

W. B. WEAVER,

Notary Public, Erie County.

283 SCHEDULE A

FACE VALUE OF CONTRACTS NECESSARY
TO REFIL SERIES DUE TO LAPSATIONS,
NON-PARTICIPATING CERTIFICATES.

		FACE VALUE OF CONTRACTS Non-participating certificates & Cash		
286	Series	Lapsations	Surrenders	Total
	B	3100.	9700.	12,800.
	C	8500.	3000.	11,500.
	D	20700.	7600.	28,300.
	E	23500.	10600.	34,100.
	F	6700.	3500.	10,200.
	G	30200.	7600.	37,800.
	996	34200.	4000.	38,200.
	993	25000.	4000.	29,000.
	990	18800.	3000.	21,800
287	887	25800.	5500.	31,300.
	884	19000.	9000.	28,000.
	881	15800.	18200.	34,000.
	878	18800.	10500.	25,300.
	875	21200.	6000.	27,200.
	872	16400.	2500.	18,900.
	869	10700.	3000.	13,700.
	866	26500.	7000.	33,500.
	863	21800.	1000.	22,800.
	860	19100.	3300.	22,400.
	858	19600.	9000.	28,600.
288	856	10700.	3500.	14,200
	854	4700.		4,700.
	852	9000.	5000.	14,000.
	850	13600.	1000.	14,600.

848	18800.	3500.	22,300.	289
846	22600.		22,600.	
844	26000.		26,000.	
842	7500.		7,500.	
840	6500.		6,500.	
839	16200.	500.	16,700.	
838	20900.	1500.	22,400.	
837	14200.	1500.	15,700.	
836	18000.	2000.	20,000.	
835	15200.	2000.	17,200.	
834	11600.	2000.	13,600.	290
833	11600.		11,600.	
832	6200.		6,200.	
831	2500.		2,500.	
<hr/>				
Total	617200.	150500.	767,700.	

293

STATE OF NEW YORK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JAMES B. DILLINGHAM, as President; SYLVANUS B. NYE, as Vice-President; FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the Mutual Benefit League of North America operating under an agreement and declaration of trust,

294

VS

GEORGE V. McLAUGHLIN, as Superintendent of Banks of the State of New York; CARL SHERMAN, as ATTORNEY GENERAL of the State of New York, et al.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss:
CITY OF NEW YORK }

295 CHARLES E. McMANUS, being duly sworn, I am a Deputy Attorney General residing in said City of Albany. I have assisted in the investigation of this proceeding and have appeared in behalf of the defendants herein with Mr. Edward G. Griffin, Deputy Attorney General.

296 The plaintiff in this proceeding is operating and conducting its business in a territory comprising a large number of counties in the State of New York and throughout the State of New York, and is conducting and operating a business in which the public generally has an interest; that its declaration of trust has been filed and recorded and made a matter of public record in the Erie County Clerk's office, State of New York, being recorded in said office on the 28th day of July, 1921 at 4:22

P. M. in Liber 24 page 214 of Miscellaneous Rec- 297
ords.

That the following is a true copy of the said declaration of trust as filed in the said office:

DECLARATION OF TRUST

This agreement made and entered into this 28th day of July, 1921 by and between William S. Dillingham, James B. Dillingham, Merwill F. Dillingham, William B. Dillingham, Frederick A. Ballou, Neal S. Sells and Sylvanus B. Nye, who are the 298
beneficiaries of a Trust herein created and declared and are hereinafter called for convenience "The Contractors" parties of the first part, and James B. Dillingham, Frederick A. Ballou and Sylvanus B. Nye, who are in this agreement made Trustees operating as the Mutual Benefit League of North America, and hereinafter called and designated for convenience "The League" parties of the second part hereto; and

Whereas, the said parties of the first part have 299
for their mutual benefit and for the purpose of co-operating in a savings and investment operation become the owners of seven certain contracts in a home producing, productive and savings organization, each of the said parties being the possessor of one of said contracts and all of said seven contracts comprising Series A in the mutual benefit organization so devised and operating, and each of said contracts being dependent upon the other for the working out of the plan proposed; and 300

Whereas, in order that the plan as proposed in the said contracts in said Series or in other or future series of contracts may be pursued, carried on and concluded for the benefit of the said parties

301 of the first part, it is necessary that the said organization, contracts, plan and business be delivered, turned over to and operated by the Trustees, and

Whereas, the parties of the second part herein have agreed to act as such Trustees, owning, controlling, operating, managing and having entire charge, custody and control over the assets, property, moneys or values growing out of or existing by reason of the said seven contracts so entered into by the said parties of the first part; therefore

302 It is Mutually Agreed between the said parties hereto, viz:—Between the said contractors or beneficiaries and the said Trustees as follows, to wit:

FIRST: The duration of the Trust shall be twenty-one years, at the end of which time the then Board of Trustees shall proceed to wind up its affairs, liquidate its assets and distribute the same among the parties in interest as they may appear under the terms hereof provided, however, that if

303 prior to the expiration of said period the majority of the contract-holders of the Series A shall, at a meeting called for that purpose, vote to terminate or renew this trust, then the said Trust shall either terminate or be renewed for such further period as may be then determined. In case of termination of this Trust, either on the expiration of the twenty-one years, as provided herein, or on the decision of the Contract-holders of Series "A" expressed in manner aforesaid, the then Trustees shall act until such time as the duties set forth

304 herein as incumbent on them, shall have been performed.

SECOND: The business to be conducted is to be so conducted, operated, managed, controlled,

etc., by the said Trustees under the name and style 305
 of the Mutual Benefit League of North America
 and is so controlled, owned, operated and managed
 for the benefit of the said contractors. It being
 expressly understood that by the agreement of
 which this instrument is evidence a Trust, and not
 a Partnership is created.

THIRD: The business to be conducted is the
 holding, investing, managing and handling of all
 funds, property, engagements of any kind or 306
 description which come into the possession, control
 or management of the said League by reason of
 or growing out of the said contracts in the said
 Series A or the contracts in any other future series
 which participate in this organization. The Trus-
 tees, or any two of them are hereby further author-
 ized to take title to and sell any property coming
 into their possession or taken by them by fore-
 closure proceedings or otherwise and without any
 liability on the part of the purchaser to the appli-
 cation of the purchase money; and the said Trus- 307
 tees or any two of them may sue and be sued, main-
 tain and defend in the name of themselves as
 Trustees or in the name of The Mutual Benefit
 League of North America, any and all actions in
 law or in equity or in any jurisdiction for and on
 behalf of the organization and cestuis qui trustent
 herein named, and collect, sue for, receive and
 receipt for all sums of money at any time allowing,
 due to said Trust, and to make title by deed, Bill
 of Sale or other instrument or conveyance to any 308
 property, whether real or personal belonging to or
 coming into their possession by purchase gift,
 devise, foreclosure or any other manner. Copies
 of all of said co-operative contracts in said Series

- 309 A being placed in the custody of said Trustees for the purpose of holding and of making clear and explaining the further objects of the said business so to be operated, conducted and managed by the said Trust: And the said contractors hereby accept notice of the terms and conditions of the said contracts and the provisions contained therein and the obligations and powers of the said Trustees; and further, it is hereby declared and understood and notice taken thereof by all the parties
- 310 hereto that neither the said contractors, parties of the first part, nor the said Trustees, parties of the second part, are now or shall be in the future at any time individually liable or responsible for any of the debts of the said Trust or for any of its obligations, agreements or other instruments or acts creating personal liability, and that all acts of said Trustees in the furtherance of said business, shall be acts of the said organization and not the acts of the said individuals, either as Trustees or as beneficiaries.

- 311 **FOURTH:** It is understood by the parties hereto that the taking up by the Trustees herein for control and management of co-operative contracts in any other or future series shall not affect the status of Series A contractors parties hereto, and that where changes in the form or substance of future Series contracts may be necessary or advisable, such changes may be made in such future Series contracts by said Trustees herein as
- 312 and when in their judgment the same may be required.

FIFTH: The said parties of the first part hereby vest the legal title to and the absolute control of all trust property funds or interest of any

description arising out of the said co-operative 313
contracts or the operation of the said business in
them, the said Trustees, subject however, to the
carrying out so far as the same may be possible of
the terms of the contracts in said Series A or in
any other Series of contracts heretofore or here-
after turned over to or operated by said trust.

SIXTH: The said Trustees shall constitute a
Board and shall elect and select a President, Vice-
President and Secretary-Treasurer; and such other
officers, employees, etc., as the said Board of 314
Trustees shall deem necessary and proper in the
carrying out of the said operation, a majority of
the said Board being sufficient to control the action
of said Board and being binding upon all parties.
All contracts, obligations or other instruments in
writing shall be signed The Mutual Benefit League
of North America by the President or Vice-Presi-
dent and counter signed by the Secretary-Treas-
urer. A seal may be devised and used by the said
Trustees, if desired.

315

SEVENTH: The said Trustees shall have the
right at all times, in the making of any contract
whatever or the issuing of any obligations or in-
strument in writing of any character whatever, to
stipulate therein their personal and individual
exemption from any liability in the making of said
contracts, instruments or other obligations and also
where in any case by reason thereof said Trustees
or any one of them is held personally liable, he or
they shall be indemnified in full out of the funds, 316
property and assets of and belonging to the said
trust funds and estate hereby created, and said
Trustees shall also have the right to pledge the
Trust property for any of their contracts or obliga-

317 tions. It is also understood and agreed that the parties of the first part hereto being the Contractors and also the said Contractors as holders of certificates, or any future or other holders of certificates are and shall be exempt from personal liability or responsibility on any written contracts, obligations or other instruments in writing made by the said League or for any debts or liabilities created thereby and all written contracts shall contain a substantial copy of this stipulation for the
 318 purpose of giving notice to all persons dealing with the said League.

EIGHTH: For the purpose of indicating the extent of the interest of the said contractors or beneficiaries parties of the first part hereto, in the trust estate.....
 certificates may be issued by the Trustees signed by the Mutual Benefit League of North America by its President or Vice-President, attested by the Treasurer, with its seal attached, designating that
 319 each contractor, party of the first part hereto, shall have a designated interest or share in said trust estate.

NINTH: For the purpose of convenience only, said certificates may represent any part of seven thousand (7000) shares to be issued to the said contractors or parties of the first part, and a nominal value or sum fixed therefor of One Hundred (100.00) dollars per share; it being understood and agreed that such value at the time of the making of this contract is nominal and fictitious only
 320 and is so fixed for the purpose of convenience only. Said shares allotted shall be issued by the said Trustees to the Contractors herein at the signing of this instrument and shall be in such form as said

Trustees shall prescribe in conformity with the 321
terms of this Instrument.

Said shares shall be negotiable and transferable
on the books of the said Trustees, and, upon the
return of any certificates properly endorsed and
signed, the same may be cancelled and split up
into such parts as the holder thereof desires, and
issued to such person or individuals as said holder
shall designate in his assignment which said assign-
ment shall appear in the form prescribed by the 322
Trustees on the back of each certificate issued.
The said certificates by personal property and evi-
dence only of the interest of the original holder in
said trust estate and shall pass to the successors
and assigns upon the death of the holder as per-
sonal property as directed by the law of succe-
sion. The death of the holder of the original cer-
tificates issued to the contractors herein or any
successive or future holder of any certificate or
part thereof, shall not affect in any manner the 323
continuance of the said Trust nor give to any
holder of such certificate the right for any account-
ing, partition or any other means in law or in
equity for distributing the said trust estate. The
value of any such interest, shares or certificates to
be fixed and determined by the Board of Trustees
at anytime they so desire and such value shall be
dependent and based upon the net earnings of the
trust estate, over and above the cost and expense
of administration and operating, and such shares
or certificates as to value are independent of the 324
value of the respective Series co-operative con-
tracts, which stand upon their own terms and con-
ditions.

- 325 TENTH: Regular meetings of the contractors, parties of the first part hereto shall be held at the office of the Trustees once each month and special meetings may be called at any time upon the written request of any three of such Contractors. The Contract-holders of Series A shall, at each annual meeting or adjournment thereto, by majority vote, elect three Trustees to serve for the next ensuing year. In case of death, resignation, inability or refusal to act on the part of any Trustees or
- 326 Trustees, the remaining Trustee shall fill such vacancy for the unexpired term. As soon as any Trustee elected by said Contract holders or by the remaining Trustees to fill such vacancy shall have accepted the Trust, the Trust Estate shall vest in the new Trustee or Trustees without any farther act or conveyance. In case of two vacancies existing at any one time, the same shall be filled by the contract-holders of Series A at a special meeting called for such purpose in manner provided for herein. Contractors parties of the first part
- 327 hereto, may investigate the affairs of the Trust, make reports to shareholders and make any amendments to this Declaration of Trust, which are deemed necessary and proper. ' On the first Saturday in February of each year, a meeting of the shareholders may be held at which one of the contractors, parties of the first part hereto, shall preside and such shareholders shall be informed of the conditions of the Trust Estate by proper reports, make such suggestions to the Contractors,
- 328 parties of the first part hereto as may be advisable and in general, to make such inquiries, offer such advise and suggestions, receive such reports and thereby aid and assist the Contractors herein

and the Board of Trustees in carrying out the 329
objects of the said Trust.

ELEVENTH: The office and place of business of the said Trust, shall be in the City of Buffalo, New York and the business may be carried on at any place in the United States, or any foreign country as deemed advisable.

TWELFTH: It is understood that when any change is made in the Trustee under this instrument, that the successor or successors of any one or more of them shall succeed to the same rights 330
and powers and be subject to the same duties and liabilities and have a like compensation as the former Trustee.

THIRTEENTH: Each Trustee (as such Trustee and as an officer of the Board of Trustees) shall receive as compensation for his services for the first year a sum not to exceed Ten Thousand (\$10,000.00) dollars and the Board of Trustees shall have the power to fix the salary and compensation of all other officers, employees and agents of 331
said Trust.

FOURTEENTH: It is further understood that in no instance shall any person or persons dealing with the said Trust and said Board of Trustees have any obligation either in law or in equity resting upon him to look after the application of any Trust funds or property coming into the hands of the said Trustees.

FIFTEENTH: The said Trustees shall from time to time credit to the account of or pay in such 332
form and manner as they may deem most advisable, to the Contractors or parties of the first part hereto, and also to any other or future certificate holder such sum or sums growing out of the opera-

333 tion of the Trust Estate as may be necessary and
advisable, each contractor and each certificate
holder receiving pro rata share as evidenced by
his certificate or by his Series A co-operative con-
tract, showing his proportionate interest in the
Trust.

In Witness Whereof, the said William S. Dilling-
ham, James B. Dillingham, Merwill F. Dillingham,
William O. Dillingham, Frederick A. Ballou, Neal
S. Sells and Sylvanus B. Nye, parties of the first
334 part hereto, and hereinbefore mentioned by name
and as "Contractors" have hereunto set their
hands and seals in token of their assent to and
approval of said terms of trust; and James B. Dil-
lingham, Frederick A. Ballou and Sylvanus B. Nye
parties of the second part hereto, Trustees for
themselves and their successors have hereunto set
their hands and seals in token of their acceptance
of the Trust hereinbefore mentioned, the day and
year first above mentioned.

335		Wm. S. Dillingham	L.S.
		James B. Dillingham	L.S.
	Contractors	Merwill F. Dillingham	L.S.
	or	William O. Dillingham	L.S.
	Beneficiaries	Frederick A. Ballou	L.S.
		Neal S. Sells	L.S.
		SYLVANUS B. NYE	L.S.
		James B. Dillingham	L.S.
		As Trustee of the Mutual Bene- fit League of North America.	
		Frederick A. Ballou	L.S.
336	Trustees	As Trustee of the Mutual Bene- fit League of North America.	
		Sylvanus B. Nye	
		As Trustee of the Mutual Bene- fit League of North America.	

STATE OF NEW YORK
COUNTY OF ERIE
CITY OF BUFFALO

} ss:

337

On this 28th day of July, 1921, before me, the subscriber personally appeared William S. Dillingham, James B. Dillingham, Merwill F. Dillingham, William O. Dillingham, Frederick A. Ballou, Neal S. Sells, and Sylvanus B. Nye to me personally known to be the same persons described in and who executed the foregoing instrument, and they duly, severally acknowledged to me that they executed the same.

338

L.S. James G. McKillen,
Notary Public in and for the County of
Erie, New York

STATE OF NEW YORK
COUNTY OF ERIE

} ss:

339

SEAL

I, A. R. ATKINSON, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record, do hereby certify that I have compared the annexed copy of Declaration of Trust with the original record thereof, entered and on file in the office of the Clerk of Erie County, and that the same is a correct transcript therefrom and of the whole of said original.

340

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said County and

341 Courts at Buffalo, this 29th day of June, 1923.
No. 27997

A. R. ATKINSON,

Clerk.

CHARLES E. McMANUS

Sworn to before me this 9th day of July, 1923.

PHILIP COAN

Notary Public

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343

344

IN THE UNITED STATES DISTRICT COURT 345
 FOR THE NORTHERN DISTRICT OF
 NEW YORK

JAMES B. DILLINGHAM, as President; SYLVANUS B. NYE, as Vice-President; FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the Mutual Benefit League of North America operating under an agreement and declaration of trust,

VS

346

GEORGE V. McLAUGHLIN, as Superintendent of Banks of the State of New York and CARL SHERMAN, as ATTORNEY GENERAL of the State of New York.

MINUTES OF PROCEEDINGS had in the above entitled matter before a Constitutional Court of three Judges convened and held in the Federal Building, Albany, New York, on Monday, June 25th, 1923, at ten o'clock in the morning. 347

PRESIDING:

HONORABLE JULIUS M. MAYER,
 HONORABLE AUGUSTUS HAND,
 HONORABLE FRANK COOPER,
 Judges.

APPEARANCES:

HONORABLE OLIVER D. BURDEN, Solicitor for Plaintiff, Office and Post Office Address, 914-918 University Building, Syracuse, New York; 348

HONORABLE EDWARD G. GRIFFIN, Deputy Attorney General, State of New York, Albany, N. Y., The Capitol, for the Defendants.

349 JUDGE MAYER: The first business is a motion for an injunction before a United States Circuit Court Judge and two District Judges.

How long do you think you will want, Mr. Burden?

MR. BURDEN: If Your Honors please, I think I can get through in half an hour.

JUDGE MAYER: And you, Mr. Griffin?

MR. GRIFFIN: I should think I would take
350 at least a half an hour.

JUDGE MAYER: You may proceed.

MR. BURDEN: If the Court please: The answering affidavits of the Attorney General were served on me, by extension granted by His Honor, Judge Cooper, Saturday, so that I received them by special delivery yesterday at noon. I have blocked out, since yesterday noon, a form of reply affidavits, which I would like to file later, if necessary, meeting the allegations of the Superintendent of Banks in many particulars, and I would like
351 a period of three days within which to file those reply affidavits. Of course, under the section of the Judicial Code, I expected to have the necessary time within which to do it on the return day here today, but it has been a physical impossibility. They were served on me at Syracuse at noon yesterday, and I have not been able to do anything, except to block out a set of reply affidavits.

JUDGE MAYER: We will receive those.

352 MR. BURDEN: And I can have two or three days within which to do that?

JUDGE MAYER: Yes.

MR. GRIFFIN: While Mr. Burden is on that

subject, I would like to say that I prepared my 353
 brief in typewritten form, and if, at the conclusion
 of the argument, the Court needs time for the
 decision of this case, I would be pleased to furnish
 printed copies of the brief. I assume that can be
 arranged for at the end of the argument.

JUDGE MAYER: We will see at the end of it
 You may proceed.

MR. BURDEN: If it please The Court: The
 Constitutionality of this statute is attacked upon
 the ground that it violates the provisions of the 354
 State Constitution and of the fourteenth Amend-
 ment of the Constitution of the United States, and
 it also comes within the Fifth Amendment, as I
 understand it, referring particularly to depriving
 a person of life, liberty, or property, without due
 process of law.

Now, this Amendment is Section 174 of the Bank-
 ing Law of the State of New York, and purports to
 prevent and prohibit what are known as the three
 per cent. company from doing business in the State 355
 at all. The statute is penal and makes it a mis-
 demeanor for any person, or individual, to engage
 in the business of soliciting funds for investment
 purposes, or for loans later in sums of less than
 \$500.

Now, I have filed with Your Honors a somewhat
 careful brief, going into the details of this subject,
 and unless you desire to pass upon the matters
 summarily here, I will not—

JUDGE MAYER (Interrupting): Well, we 356
 would like to hear argument on it.

MR. BURDEN: Now?

JUDGE MAYER: I think we would like to
 hear argument on it at this time.

357 MR. BURDEN: Very good.

JUDGE MAYER: Now, at the beginning of that section the phrase is used, "Except as hereinbefore authorized."

MR. BURDEN: Yes.

JUDGE MAYER: Now, what does that mean?

MR. BURDEN: The Banking Law for some time has regulated mutual savings and loan associations and private bankers and individuals, and I assume that is what it means, if it means anything.
 358 but our contention is that it does not really mean anything for the simple reason that there has been an attempt on the part of this plaintiff here, answering your question as directly as I can, to get some legislation, and I propose to set up, in answer to the answering affidavits of the Superintendent of Banks, the history of the attempts which have been made on the part of my client to get some regulatory legislation, some legislation that would classify these companies of this sort which
 359 entered into these contracts with persons for the loaning of money at three per cent., so that the good ones may survive and, as a matter of competition, the poor ones may drop out.

JUDGE HAND: Mr. Burden, Is your client a private banker within the definition of the existing legislation, and does he conform to the Act?

MR. BURDEN: Why, no. I do not think so. The statute, or this section follows certain verbiage which I find in the Banking Law that has been used, that is used in connection with private
 360 bankers in certain instances. That is true, but here is an association doing business as a common law trust, with trustees, and acting in that capacity. No attempt has been made by the Superintendent

of Banks, or by the State of New York to regulate 361
 these companies by the passing of any legislation
 until this law was passed, and this law is, of course,
 confiscatory. They do not give any length of time
 for them to wind up. They do not provide any
 way to stop this line of endeavor upon the part of
 the individuals, or trusts, but they simply say it is
 a misdemeanor.

Now, if I am not diverging too far, this concern
 which I represent is here solely and alone as plain-
 tiff. No other person is interested in this applica- 362
 tion at all, except as they may benefit by the results
 of the decision which we obtain, and I am not
 appearing here for any other allied association,
 about which the Superintendent is worried so
 much, perhaps, but this particular plaintiff, which
 I represent, has seven million dollars of contracts
 outstanding. It has nine thousand contract owners.
 It has loaned over two hundred and fifty thousand
 dollars under its contracts. It has moneys on hand,
 as stated in the affidavits, of considerable amount, 363
 approximately one hundred and fifty thousand
 dollars ready now to put out in these loans.

It is said that these associations cannot be
 worked out. All right. As a matter of human
 interest to Your Honors, we demonstrate that it
 can be worked out and is being worked out, and
 that this particular plaintiff is entirely responsible,
 and is entirely solvent, and capable of liquidating
 today, if it must be done, and absolutely returning
 to every contract owner every dollar to which he 364
 is entitled under his contract. We set forth in our
 moving papers, our printed papers, a certificate by
 a certified public accountant showing what I am
 stating now to be the fact.

365 In addition,—and I might say at this time, to get the matter before Your Honors and put you in touch with the situation, an attempt was made when Mr. Newton was Attorney General to have a regulatory statute passed to cover our particular case, and our President, who is here in court, came down here to Albany, and a bill was introduced when Mr. Newton was Attorney General, and when Mr. McLaughlin was Superintendent of Banks, as number one in the year 1921, and also in the Senate
366 by Senator Gibbs, and in the Assembly by Mr. Rice, and that bill, because of general opposition and so on, and not having been worked out, was never enacted into law. It followed a law which was placed on the statute books of the State of Pennsylvania, amending the Banking Law of the State of Pennsylvania to cover these companies, but for some reason or other, the Superintendent of Banks takes the position that it is necessary to have this confiscatory legislation to protect the situation.

367 JUDGE MAYER: Let me ask you this question: This Act operates to prevent you, according to your contention, carrying out existing contracts?

MR. BURDEN: Yes.

JUDGE MAYER: It also prevents you from making new contracts?

MR. BURDEN: Quite so.

JUDGE MAYER: Now, as a matter of practical information: If you are permitted to carry out your existing contracts, what happens? Is it a
368 system by which you need new contracts and new matters?

MR. BURDEN: Not absolutely so, only as the future of the business, which is growing, as the matter of the future of the business requires that

we go on; but, we are able to liquidate today. 369

JUDGE MAYER: What I mean to say is this: Suppose that you were able to carry out your existing contracts.

MR. BURDEN: Yes.

JUDGE MAYER: By which A, B, C, and D are to pay so much, under your system.

MR. BURDEN: Yes.

JUDGE MAYER: Then, you can fulfill those contracts?

MR. BURDEN: Oh, yes, absolutely. Under 370 our contract with the contract owners, we can absolutely liquidate with them and go out of business;

JUDGE HAND: Do you think the statute covers existing contracts of that kind?

MR. BURDEN: Yes, we deem that it does, absolutely.

JUDGE HAND: That it covers existing contracts?

MR. BURDEN: Yes. We figure that we are violating the law if we take a single step here, even 371 to the loaning of money upon applications that have been made. You understand, these contracts are worked out in series of one hundred and forty thousand. Each contract holder, under the contract, must make his payments, or there must be a lapse, whereby he suffers certain losses, but gets a certain amount. Under these contracts, and under the declaration of trust, only a certain amount of this money is permitted to be taken for expenses, salaries, or any other purpose, and that 372 amount is three-eighths of one per cent., as I have it here. There are no expenses, in fact, to amount to anything, except salaries to these trustees, when they feel that the League is able to pay them, and

373 then they are interested in getting their salaries which cannot exceed \$10,000 to each trustee. Otherwise, it has been demonstrated, and will be demonstrated to anybody who desires to work it out, and I will put this in my answering affidavits, that our series of one hundred and forty contracts work out absolutely in accordance with that statement which we have prepared.

Now, the Superintendent of Banks, we will set forth in our answering affidavits, agreed to work
 374 out this statement of ours in connection with the statement of our accountants and auditors before this bill here in question went through. Our affidavits will show that the Superintendent said he attempted to look it over on the way up from New York. This was just before it went through the Senate. And he said that some acquaintance of his,—he said this before the Committee on Banking when the Legislation was going through,—that
 375 had had time to work it out, but that he expected to work it out to see how our business operates. He attempted to work out these series of a hundred and forty contracts, involving a hundred and forty thousand dollars, in three hours coming up from New York, in which attempt he was interrupted, while, as a matter of fact, it took Mr. Dillingham, and the auditors, and adding machines, over two weeks to work out that sheet which we have before you. There are forty thousand computations to
 376 prove that, the different sources of income which arise from the payment of these moneys, and the investment and reinvestment and the increment thereon.

Now, the only secret about this operation is that

this company takes the money of the small investor, 377
 saves it for him, and it does not pay him interest
 until his payments accumulate at the end of the
 year. That is how they are able to loan him back
 that money at three per cent. They get the money
 of various contract owners into their funds, and
 loans are made upon mortgages on real estate.
 Their loans are strictly upon desirable, improved
 real estate; and the three trustees of this Mutual
 Benefit League of North America do not need a
 certificate of character in this court or in 378
 the State of New York. They are men who
 are entirely responsible and who will bear the
 closest scrutiny, and the subscribers to these con-
 tracts are lawyers, doctors, small business men,
 plumbers, carpenters and the largest,—and I will
 set this forth in my answering affidavits,—the
 largest number of any group are bankers and bank
 employees who subscribe to our contracts, and they
 do it because they can get three per cent. interest
 on their money.

JUDGE MAYER: Now, to get back to this 379
 provision of the statute which reads, "Except as
 hereinbefore authorized". Now, the old statute
 provides various regulatory features for private
 bankers and building and loan associations, and so
 forth and so on.

MR. BURDEN: Yes.

JUDGE MAYER: Now, I don't know what the
 position of the Attorney General is, but I under-
 stand your position to be that the Act under con- 380
 sideration completely prohibits.

MR. BURDEN: Absolutely.

JUDGE MAYER: That it does not regulate.

MR. BURDEN: That is it.

381 JUDGE MAYER: Is that right?

MR. BURDEN: Yes, sir. It refuses to classify.

JUDGE MAYER: And you contend that? "Except as hereinbefore authorized" does not mean anything?

MR. BURDEN: Will you kindly state that again? I did not quite get it.

JUDGE MAYER: This statute that we have here before us starts off by saying; "Except as
382 hereinbefore authorized, no individual, either for himself, or as trustee," shall do so and so.

MR. BURDEN: That is private banking, as I take it.

JUDGE MAYER: Well, you mean to say, then, "Except as hereinbefore authorized", means that, except as private bankers, except as they are permitted, and so forth, and so on, to do private banking?

MR. BURDEN: Yes.

383 JUDGE MAYER: Well, now, that leads us to the statutory definition of a "private banker", and do you say your people are not private bankers?

MR. BURDEN: No, we are not.

JUDGE MAYER: Within the statutory definition?

384 MR. BURDEN: No, we are contractors. We have been trying to get under this Banking Law as a common law trust, and as individuals doing in business in the accumulating of money for real estate loans, which is similar to the old building and loan associations. They are really the people that are fighting us and who have incited the Superintendent to do what he thinks is necessary here in the premises. They are the people who are behind

it. They don't like us because we are loaning 385
 money at three per cent. They cannot do it under
 their system, which is more cumbersome, and they
 cannot figure it out the way we do. Our real—well,
 I am getting off the point now, but getting back to
 this proposition, we say that "Except as herein-
 before authorized" refers to private bankers and
 not to this business at all.

JUDGE COOPER: You mean, because of the
 fact that the prohibited parties here are not
 included within any of the pre-existing provisions 386
 of the Banking Law, it means absolutely nothing
 here?

MR. BURDEN: I am satisfied it means nothing
 here. You see we are, under the brief and under
 the cases, we are prevented from doing what a
 corporation might do. That leads us off into a
 long line of argument, but we as individuals, as
 trustees, it hits us exactly, because it says at the
 beginning of the Act there that it is to prevent,
 you can see it very plainly, it is an Act in relation 387
 to banking corporations, individuals, partnerships,
 unincorporated associations, and so on—I cannot
 find the exact point here.

JUDGE MAYER: We have it here.

MR. BURDEN: It reads, "An Act to amend
 the Banking Law in relation to incroachment of
 individuals as trustees or otherwise upon powers
 of private banks, savings banks or savings and loan
 associations." That is the strike of it. It is a
 strike bill, and that is all there is to it.

JUDGE MAYER: Well, now, let us get at this 388
 first, the main thing, and get at it in a definite way.

MR. BURDEN: Yes.

JUDGE MAYER: Now, you take your statute

389 in front of you.

MR. BURDEN: Yes, sir, I have it.

JUDGE MAYER: Now, the first thing is, "Except as hereinbefore authorized, no individual, either for himself or as trustee, and no partnership or unincorporated association, shall engage in the business of receiving deposits of money or payments of money in installments, for co-operative, mutual loan, savings or investment purposes in sums of less than five hundred dollars each, 390 under a declaration of trust or otherwise." Now, that is one thing that, according to your theory, the statute prohibits?

MR. BURDEN: Yes, sir.

JUDGE MAYER: Then it goes on about advertising, which is only a secondary question. Then, it goes on: "Nor shall any such unauthorized individual, trustee, partnership or unincorporated association engage in or conduct a business similar to the business of a savings bank or of a 391 savings and loan association, or promise to make loans at any time, either fixed or uncertain, upon real estate security for building, home-owning, savings, or investment purposes as an inducement for the payment of such sums of money in installments of less than five hundred dollars each to any such unauthorized person, trustee, partnership or unincorporated association."

Now, it seems to me, and I am speaking only of my own views, that there is a great deal of difference between that first clause and the last clause. 392

MR. BURDEN: Yes.

JUDGE MAYER: Am I right about that?

MR. BURDEN: I think so, yes, sir.

JUDGE MAYER: Now, the first clause pro-

hibits the engagement in the business of receiving 393
deposits and so forth.

MR. BURDEN: Yes, sir.

JUDGE MAYER: The last clause is so drawn
that it would prevent—it says: “Nor shall any
unauthorized individual,” and so on, do so and so,
“or promise to make loans at any time, either fixed
or uncertain, upon real estate security for build-
ing, home-owning, savings, or investment pur-
poses”; now, in your actual conduct of your busi-
ness you would come under both of those? 394

MR. BURDEN: Yes, sir. We absolutely agree
in our contract, which is annexed to our papers
here, to make loans. That is all clearly defined
here. These, of course, these terms we have got
to carry out. That is our contract, to loan that
money out to the contract owners at the times and
in the manner specified. The manner in which we
fix these loans is in the order of the applications
received by solicitors and the order in which the
man signs them, and that man, in the order of time, 395
is entitled to his loan as against the man who next
signs it, and so on down the list, and we are pre-
vented from carrying out all the terms of the con-
tract, as well as that one, by the terms of the
statute.

JUDGE MAYER: Will you state, if you can,
briefly, or will you take us through one of your
transactions?

MR. BURDEN: I will try to do so.

JUDGE MAYER: You understand what I 396
mean?

MR. BURDEN: Yes.

The applicant signs a contract, which is annexed
as Schedule A to the moving papers here, and he

397 applies for and agrees to accept one of your three per cent. loan contracts, of the face value specified, in accordance with the terms and conditions set forth in the contract. Then he pays down and agrees to pay a certain sum of money in monthly installments on the contract on or before the tenth day of each month, following the date, until it is matured, or until he has accepted a loan, or made a settlement for the sum involved on some one of the six options offered under the terms of the contract. I am reading now the original application, 398 briefly. He makes this application upon the terms of the contract, and so on.

Now, the contract itself is here, Schedule B, and I will call your attention to it. Now, the options are very brief, and I think the clearest way to cover it is to state it in full:

“Section 6. Options on Matured Contracts.

When a sum of money equal to the Face Value of this Contract shall have been accumulated in 399 the Trust Fund, and provided that all prior contracts of this Series shall have been satisfied, this Contract shall mature; and if all payments to become due hereunder shall have been made, one of the following options may be exercised by the Contract Owner, subject to the terms and conditions of Section 9 hereof.

Upon the demand of the Contract Owner—

(a) The League will erect a building or buildings, or make improvements on real estate for the 400 Contract Owner, at a total expenditure not to exceed the Face Value of this Contract.

(b) Or, The League will loan to the Contract Owner, a sum of money not to exceed the Face Value of this Contract for the purpose of erecting

a building or buildings or making improvements 401
upon real estate.

(c) Or, The League will loan to the Contract Owner a sum of money not to exceed the Face Value of this Contract for the purpose of paying or discharging any encumbrance then existing against real estate."—take an assignment of the mortgage, or a mechanics lien, or building loan, and so forth.

(d) Or, The League will loan to the Contract Owner a sum of money not to exceed the Face Value 402
of this Contract for any other purpose, provided said loan is secured in accordance with the terms and conditions of Section 9 hereof.

(e) Or, The League will sell the Loan Privilege of this Contract for the highest price obtainable, and will pay to the Contract Owner, at its Home Office, an amount equal to all payments made by him on this Contract, together with a share of the Benefit Fund of the Calendar Month in which the Loan Privilege of this Contract is sold, pro-rated 403
according to the payments that have been made on all such Contracts.

Upon Maturity of this Contract, The League will notify the Contract Owner of such fact by letter, addressed to him as his address appears on The League's Records, and unless the Contract Owner shall notify the Trustees within thirty days from the date of such letter, of his desire to exercise some other option provided for herein the Contract Owner shall be deemed to have selected Option 404
(e)", which is to have his loan privilege sold.

Now, as a matter of fact, and as a matter of operation, they find that quite a percentage do not want to build and do not want to borrow the money.

405 Therefore, their loan privileges are sold and the money is turned over to them. If I may diverge here, there is not a single Contract Owner, as sworn to by the Treasurer here, somewhere in the papers, the Treasurer swears that never has a single Contract Owner made any objection. There has been no disturbance and no trouble of any kind with this Mutual Benefit League of North America.

JUDGE HAND: Where is the provision about three per cent., Mr. Burden?

406 MR. BURDEN: It is in the application and it is in the contract. They agreed to loan at three per cent. to the amount of its face value. I will find the shortest provision in relation to it for you. It is Section nine, to which we have been referring, the second paragraph, at the bottom of page two, Your Honor. The second paragraph of Section nine reads: "The Contract Owner shall pay to The League upon the making of such loan, not less than the sum of seven dollars (\$7.00) per month upon account of principal of each one thousand
407 dollars (\$1,000.00) so loaned; or seventy cents (\$.70) per month on each one hundred dollars (\$100.00) so loaned; and also a monthly installment of interest at three percent (3%) per annum, computed upon the balance remaining unpaid at the beginning of each year."

They have loaned about two hundred and fifty thousand dollars on that basis, as shown by our papers. They have fulfilled every contract to date.

408 JUDGE COOPER: Mr. Burden, may I ask you a couple of questions?

MR. BURDEN: Yes.

JUDGE COOPER: You say that you do not come within the definition of a private banker, as

defined in the previous section of the Act, which is 409
amended by this Act?

MR. BURDEN: Yes, sir.

JUDGE COOPER: Therefore, you are under
no regulation. You are not an incorporated build-
ing and loan association and, therefore, under none
of the restrictions; so that you are dealing with the
peoples' money without any control of any kind
whatever?

MR. BURDEN: Except our declaration of
trust which is more drastic than any regulation 410
that could be put over us. Our declaration of trust
is here and embodies every term and provision of
our contract and provides for it.

JUDGE COOPER: Well, is that pursuant to
any provision of statute?

MR. BURDEN: It is a common law trust.

JUDGE COOPER: Well, a common law trust?

MR. BURDEN: Yes, sir.

JUDGE COOPER: That is your definition, or
description of it, but it is not a trust made pursu- 411
ant to any statute, state or federal?

MR. BURDEN: No, sir.

JUDGE COOPER: So that, what you are
doing, then, as an individual, free from the restric-
tions of individuals doing a banking business, you
are doing a banking business, and as an individual,
you are doing a building and loan association busi-
ness, free from the restrictions which the statute
imposes upon corporate building and loan associa-
tions, and here comes a statute which says you shall 412
no longer do it. Now, what do you say is the Con-
stitutional objection to this statute?

MR. BURDEN: Well, in the first place, we say
that it makes it a crime for us to do these things

413 which are perfectly legal. Every individual citizen has the right to contract fairly, if he does not commit a fraud.

JUDGE COOPER: Well, couldn't you comply with the provisions relative to private bankers and then do this business?

MR. BURDEN: No. You run into the building and loan association then, and what we may do as a corporation, or what we might do by incorporating, I hold is not here before The Court. We
414 cannot be compelled, under the Constitution, to incorporate.

Now, The nearest case on this subject is right here in my brief; and that will answer your question more fully than I could if I talked for a long while, and that is the Dakota case. I have cited all the general cases, and we ran into this Dakota case, which follows two New York cases, the Marx case and the Jacobs case, and the Dakota case is based on two of our Court of Appeals decisions
415 here, and while the Dakota case has not been passed on by the United States Courts yet, in any way that I know of, it is right here on this point exactly that you are discussing, and the Court there held that it could not be done, and that is the case of the State against Scougal, North Dakota, it is, and the Court summarizes the principle as I stated in my brief there at page ten:

“It is contended that citizens may associate themselves together, and become a corporation,
416 under the act, and, as such corporation, transact the business. This is true, but can the citizen be required to abandon a business, not necessarily injurious to the community, which he is carrying on, and be required to invest his capital in a cor-

poration over which he may have no control, except 417
 as a mere stockholder, or otherwise be deprived of
 his right to pursue his lawful calling? Are not
 privileges and immunities granted by the act to
 corporations that are denied to individual citizens?
 It may be contended that there is no discrimination
 as between corporations; that all corporations
 organized under the act are granted the same priv-
 ileges and immunities, and that this satisfies the
 constitutional provision. But this is too narrow a
 construction of this important constitutional pro- 418
 vision, intended for the protection of the rights of
 the citizen. In law, a corporation is a citizen of
 the state of its creation, and for many purposes a
 person in law also. When these privileges are con-
 ferred upon private corporations, which at com-
 mon law belong to the citizen, and the same privi-
 lege is denied to the individual citizen, this pro-
 vision of the constitution, in our opinion, is vio-
 lated."

Now, we stand here—

JUDGE COOPER (Interrupting): What kind 419
 of a statute was that?

MR. BURDEN: I beg your pardon?

JUDGE COOPER: What kind of a statute
 was that?

MR. BURDEN: Well, in that statute, they
 attempted to prevent the individual from doing a
 building and loan business. I discuss the case
 here. It prohibited individuals from engaging in
 the banking business and allowed only corporations 420
 to do so. That was the purport of the statute.

Now, as to the Jacobs case and the Marx case,
 which I discuss at length in my brief here, and
 which Your Honor calls to my mind, in one case

421 they wanted to prevent people from making cigars in New York City in tenement houses, and in a very elaborate opinion the Constitutionality of that kind of a statute was discussed, and in the Jacobs case, which was the oleomargarine case, they attempted to prohibit the manufacture and sale of oleomargarine.

It is conceded here that the State of New York may and can and should regulate; that they may and can and should classify this line of business; 422 and we stand here frankly in court asking for it, and we have stood in the halls of the Legislature and asked for it for two years. This concern started doing business in 1921, and I will show that in my answering affidavits, and under an opinion by the Attorney General, Mr. Newton, it was determined that we should go ahead until some regulatory statute was passed. We started in 1921, and we have accumulated all this business in that time.

As a matter of interest, you may desire to know 423 that this line of business was started in England years ago and developed into a very large line of business. They say it has gone bad in Pittsburgh and that it became bad enough in Pennsylvania so that they passed a regulatory statute in Pennsylvania, and it is now on the books of that State. We don't know anything about the concern in question, and we say it is no kind of an argument to use in connection with this plaintiff here. We say here that the Superintendent of Banks and his 424 assistants fairly, and as a matter of citizenship and good neighborhood, should go over our contracts, and our system, and should go over them fairly and thoroughly, and that they should accept our offer to go over it with their accountants, whoever

they desire to hire, and if they will do that we will 425
 pay them and show them that what we say is true,
 and we will do everything in our power to assist
 them until it is possible to get this line of business
 under the laws of the State of New York properly.
 But we insist upon our right to go on and protect
 our contract owners and go on and carry out our
 contracts, whether anybody else can do it or not.

JUDGE MAYER: In arguments of this nature
 there are generally two arguments advanced: You
 say you have a grand thing and the other side says 426
 it is a terrible thing. So far as I am concerned,
 that influences me very little. The Attorney Gen-
 eral says it is a terrible thing, that it must be sup-
 pressed, and the individual says it is a noble thing
 and it must be continued. Now, what I want to
 get down to is the constitutional question here.

It may well be argued that this part of the statute
 that reads: "Nor shall any such unauthorized in-
 dividual, trustee, partnership or unincorporated
 association engage in or conduct a business similar 427
 to the business of a savings bank or of a savings
 and loan association," was well within the power
 of the State, because, for instance, savings banks,
 among other things, are permitted to compound
 interest and do different things, and it might well
 be argued that that is so. It might be argued on
 the other hand that this language at the end of the
 statute, which, unless it be said to be hitched in to
 the previous part of the statute, is a prohibition
 against making a loan at any time.

MR. BURDEN: Yes. 428

JUDGE MAYER: Either fixed or uncertain,
 upon real estate for the purposes mentioned, it
 might well be argued that that is utterly unconsti-
 tutional. That might well be argued.

429 MR. BURDEN: Yes, and I do that in my brief.

JUDGE MAYER: Now, what I want to get at, and I want to hear from your opponent later on this, do you do the kind of a business—I am speaking now of that, and passing by the question as to the effect upon existing contracts, which is under the impairment of the obligation of contracts Act,—do you do the kind of business which might come, or which does come within the definition, or similar to the business of a savings bank or savings and loan association?

430 MR. BURDEN: Yes.

JUDGE MAYER: In other words, John Jones, an individual or the John Jones unincorporated association, I might say, or if I was in a city or country association, I might say, if anybody comes along, I will loan them less than \$500.00 in installments, to build a home, and, speaking for myself, I defy any legislature to stop me. But that is an entirely different thing from the preceding part of that statute. Now, where do you come out, practically, on that basis?

431 MR. BURDEN: I will address myself to Your Honor's suggestion, if I can.

JUDGE MAYER: Do I make myself clear? Do you understand me?

MR. BURDEN: I understand you, I think. They say there that we cannot engage in the business of receiving deposits of moneys or payments of moneys in installments in sums of less than five hundred dollars, nor shall we engage in business, 432 or promise to make loans as an inducement for the payment of such sums of money in installments of less than five hundred dollars. They make it a crime there, and we say that it is unconstitutional.

That is practically my answer to Your Honor's 433 suggestion, and they wipe it all out. They fix an upset loan here, or an upset amount which is a discrimination. It is discriminatory, and it destroys our business, of course. It is confiscatory, and it impairs the right of a small investor,—or it impairs the rights of the individuals to do business with the three per cent. loan companies, unless they have five hundred dollars.

JUDGE MAYER: Well, I have got your point, but I am sure you did not get mine. My 434 question is this: The State says you may have a savings bank under certain statutory provisions.

MR. BURDEN: Yes.

JUDGE MAYER: Regulations and what not. All right. Now, we come along and we find that you and some other gentlemen are conducting a business like a savings bank. Now pass by that Dakota case for a minute, which we are unable to tell about until we read it. Now, why can't the State say you must not run a business like a sav- 435 ings bank?

MR. BURDEN: Well, I assume they can.

JUDGE MAYER: Because the alternative is that you can go and get the necessary number of persons and capital, and what not, and conduct a savings bank.

MR. BURDEN: I assume that they can say that, to an extent.

JUDGE MAYER: Yes.

MR. BURDEN: But we say that, under the 436 cases, they cannot say to us that, as individuals, as trustees of a common law trust, that we have no right to do the things we are doing. The things we are doing are making contracts and taking

437 payments on contracts, strictly under our agreement with our contract owners.

JUDGE MAYER: But, you still do not answer the question. I know you want to, but I am afraid you don't answer it.

MR. BURDEN: I can assure you I am not trying to dodge it. We do not carry money on deposit.

JUDGE MAYER: Is what you do similar to that which a savings bank does, or similar to that which a savings and loan association, or a building

438 and loan association does?

MR. BURDEN: Well—

MR. DILLINGHAM: I think I can answer that.

MR. BURDEN: Just a moment. (After conference with Mr. Dillingham). Well, of course, Mr. Dillingham says that the Attorney General has ruled that we are not similar to any organization doing business under the Banking Law.

439 Now, I can simply answer that question here by my brief and by saying that, if the State of New York can say to us, that we, as individuals, cannot do what we, if we were incorporated, could do, and the statute is constitutional I am wrong. But, I contend that when the State attempts to do that, to prevent the individual from making lawful contracts, it is doing something that is unconstitutional, and we get back to my whole contention, that they can regulate, the State can classify, and that is all the State can do. That is all conceded
440 here, but they cannot stop us doing business and at the same time observe the provisions of the constitution of the United States.

JUDGE HAND: Well, now, I assume that the State claims that they have classified.

MR. BURDEN: No.

441

JUDGE HAND: And that the State claims that you are doing a banking business, a private banking business without a license.

MR. BURDEN: Well, I do not think that they claim that. But, I want to get back to the other argument which I advanced to The Court and that is that we have discrimination involved here, and I contend that that cannot be done. They say you cannot do business here unless you can get people to give you five hundred dollars right down on each transaction. Now, assuming that all they say, all they may say is true, we say that that is not regulation. That is not regulation at all, and there are some cases which I am going to cite to you in the reply brief. 442

JUDGE COOPER: Is this what you mean: That there is a constitutional right to do this kind of business, and if the State has up to this time has limited it to corporations and regulated the corporations, and has neglected to regulate it as to individuals, that you cannot be restrained from doing it, because it is in violation of the constitutional rights of the individual, and that all the State can do is to regulate you? 443

MR. BURDEN: Yes, or classify us.

JUDGE COOPER: Well, "classify" means about the same thing.

MR. BURDEN: Yes, it means about the same thing, and that will be in my reply brief.

It might be profitable for me to discuss this subject of discrimination as to the \$500.00. I have a short discussion here which I propose to put in my reply brief, and that is this: The prohibition of this Act here before Your Honors, and the last part 444

445 of it as discussed by Judge Mayer right now, does not apply to all parties engaged in the business referred to, but it only prohibits parties engaged therein on a small scale. While it prohibits parties from receiving deposits of money in installments of less than five hundred dollars, it does not prohibit parties engaged in the same line of business from receiving deposits of five hundred dollars or more than that. Now, this might be called an attempt at classification, but it is so arbitrary, 446 don't you see? That under the cases that I cite it has been held to be invalid, and, therefore, this case seems to go off on the point that where a State is attempting to do something of this sort it must be a classification, or a regulation that is not discriminatory. It must be a valid classification; it must be a valid regulation, instead of putting them entirely out of business.

Now, insofar as the Act favors those who are able to transact business on a large scale and receive deposits of five hundred dollars and over, 447 it is favoritism and is violative, and so forth, under the case as cited, and it does not give the equal protection of the law.

JUDGE MAYER: Well, if the Legislature can be justified, as I am inclined to think it can be, in distinguishing between small amounts and large amounts, that is to say, between the dollars and fifty cent pieces from people of humble means, and, on the other hand, large transactions, then, if you once concede that, as you have to, it does not make 448 much difference whether they say five hundred dollars, or a hundred dollars, or a thousand dollars.

MR. BURDEN: We do not concede that in view of the fact that they have for years regulated cor-

porations as such and are now going after individuals, and of course, I want to make this point that— 449

JUDGE MAYER (Interrupting): But, on the question of classification, the Supreme Court has held, and so has the New York Court of Appeals held valid a great many classifications.

MR. BURDEN: Yes.

JUDGE MAYER: Which takes something out of a class.

MR. BURDEN: Yes.

JUDGE MAYER: Because there is a situation 450 affecting that subject which puts it by itself.

MR. BURDEN: Yes.

JUDGE MAYER: And requires legislative treatment other than the others of the same class.

MR. BURDEN: But, here they stop us. I hold and my associates hold that we are stopped entirely. We are discriminated against in every way. We are absolutely prohibited.

JUDGE COOPER: Well, if you have a constitutional right here, it cannot be modified by five 451 hundred dollars, or by a regulation of that kind, can it?

MR. BURDEN: That is what we figure. That is the broad proposition.

JUDGE MAYER: Now, Mr. Griffin, we will hear from you.

MR. GRIFFIN: If The Court please: I request that you note the appearance of the Superintendent of Banks, Mr. McLaughlin, Judge Overacher, Second Deputy Superintendent of Banks, 452 and Mr. McManus, Deputy Attorney General, associated with me.

JUDGE MAYER: The appearances will be noted at this time.

453 MR. GRIFFIN: If The Court please: I shall try to deal with this somewhat confused situation, which I have covered in a brief of some twenty-five pages, as simply as I can.

Now, our first proposition, and the first proposition we had to consider when this question first came before the Attorney General was: Is this particular business, carried on by Mr. Burden's clients, and other similar businesses, which have been carried on in many states, and condemned in
454 some twenty other states, forbidden by the statutes of New York? And the answer of the Attorney General to that question had to be, no; they have organized themselves as a common law trust, taking unto themselves such powers as they might see fit, as individuals, and since there is no statute in New York positively forbidding an individual from engaging in parts of the banking business, the Attorney General's answer necessarily was that they violate no statute. If New York were a State
455 like Illinois, where no individual may engage in any part of the banking business this statute would have been unnecessary.

So, this statute was enacted, as Your Honors have perceived, with these three features: First, its general prohibition against loaning money on a co-operative plan; then its specific provision against advertising; and finally its specific and particular provision aimed at these parties, being the only provision of which they have any complaint, if the others do not cover them, to the effect
456 that they should not engage in the business of loan association.

JUDGE COOPER: Did you say, Mr. Griffin, if

the others do not cover them, or as the others do 457
not cover them?

MR. GRIFFIN: I say "if"; "not as"; I say, "If," I think they do. I think the general provisions comprehend them fully, but I think the last is specific and particular.

Now, this company is doing a loan association business, because it receives periodical payments by shareholders and makes mortgage loans on the installment plan.

JUDGE MAYER: Now, right there. When 458
you say that, you mean a business similar to what is covered by the New York statutes?

MR. GRIFFIN: Yes.

JUDGE MAYER: How?

MR. GRIFFIN: They receive periodical payments by shareholders and they make mortgage loans on the instalment plan. That is what a loan association does under the statute of New York.

JUDGE MAYER: And is that defined under the statute?

MR. GRIFFIN: Yes, you will find that defin- 459
ition, Your Honors, in the loan association article, if you will look in the first part of the book. I think you can locate it. It is section two of the loan association article.

JUDGE COOPER: Is it under the Banking Law?

MR. GRIFFIN: Yes, sir. I can locate it for you. It is under the general provisions of the Banking Law. Page 20, section 2, of the Banking 460
Law, right at the top of the page.

JUDGE MAYER: Now, then, you say that Mr. Burden's client is in the business of lending these accumulations to its members?

461 MR. GRIFFIN: Yes, sir. I am going to get right into that.

JUDGE MAYER: And the repayment to each member and so forth?

MR. GRIFFIN: Yes, sir. I am going to come right to that. We charge that they are doing the business of a savings and loan association, but they are not doing it in the way that a saving and loan association is permitted by our statute to do it.

There is nothing new about this association.
462 When we first provided for incorporated loan associations, it was to meet the evil of these national loan associations that were going about the country with illegal schemes, and we provided particular means by which such incorporations can be brought about in New York. Unfortunately the statute was not broad enough to forbid individuals under this new and popular form of organization known as the common law trust, and so gradually this group has grown up and we have had to deal
463 with it.

I noted my friend, when you asked him to describe just what this contract was, was none too specific, and he began to read at great length from their contract, which, as I shall later show, is a complex instrument, which the small investor cannot very well understand, although he is required to say that he subscribes to every word of it, and it is provided therein that the trustees might change it in their own interests and against the interest of
464 the depositor, or investor.

Now, this is their scheme, and it is simply this: The depositor reads his contract, and on the face of the contract, right at the top, in the largest figures and letters that appear in and on it, he sees

and reads: "3% Loan Contract". They take 465
 from him \$10.00 per month for one hundred
 months. That is eight and some fraction years.
 It is provided that he is to have a loan. But, how?
 On simply a lottery basis. The contracts in each
 series aggregate substantially a hundred and forty
 thousand dollars. That is, when they get a hundred
 and forty thousand dollars from their people into
 this scheme,—

JUDGE MAYER (Interrupting): "Their
 people," you mean, "subscribers?" 466

MR. GRIFFIN: Yes. Now, section one reads:
 "This contract is one of a Series of like Contracts,
 comprising all the Contracts, previously or sub-
 sequently written therein, and described by the
 same issue and Series Numbers as this Contract.

Each Series shall consist of Contracts aggregat-
 ing substantially One hundred and forty thousand
 dollars (\$140,000.00) Face Value. The day, hour
 and minute of the application for this Contract
 shall govern its priority of position in the Series, 467
 with the exception of loans granted in the event
 of the Death or Permanent Total Disability of a
 Contract Owner, which loans will be given priority
 by The Trustees, as provided for in Sections 7
 and 8 hereof. Applications signed on identical date
 of day, hour and minute will not be accepted.

Now, there is your first proposition: Contract,
 consideration, chance of the loan at three per cent.
 Now, contract, chance and consideration are the 468
 classical elements of a lottery, and this very
 scheme has been condemned by the United States
 District Court of Georgia;—not the same company,
 but the very same scheme has been condemned as a

469 lottery by the United States District Court for the Northern District of Georgia.

That is the scheme, and that is all that is new about it. It is brought here and it is claimed that the State of New York can't prevent it. The State of New York has simply taken the ordinary and usual means of disposing of this situation: It has forbidden to an individual, as it forbade in the private banking act, an encroachment upon the banking business of corporations.

470 JUDGE COOPER: Just a moment. Is that all there is in the private banking act?

MR. GRIFFIN: Oh, there is more than that.

JUDGE COOPER: Is not that regulation, rather than prohibition?

MR. GRIFFIN: It is regulation to that extent, but in some nine other articles of the banking law it is provided for the carrying on of that particular kind of banking business by particular kinds of
471 corporations, with particular kinds of power.

Never before has the statute definitely said that powers specifically given to a banking corporation, outside of what are already granted, are forbidden to individuals, but it has now for the first time said so, as has been said in the State of Illinois.

JUDGE MAYER: Well, if I do not disturb your argument, permit me to ask: You agree with Mr. Burden that the effect of this statute, is to completely prohibit this business by these individuals
472 as such?

MR. GRIFFIN: Oh, no. These people can organize today as a savings and loan association, and I think that every one of their depositors would

welcome the savings and loan association certificate, in place of this so-called contract that they hold today. 473

JUDGE MAYER: That does not answer the question.

MR. GRIFFIN: No, sir, this kind of business cannot be carried on.

JUDGE MAYER: Then, there is no regulation of the business at all?

MR. GRIFFIN: Yes, Your Honor, there is regulation of it as savings and loan association. 474
There is prohibition of this particular contract, but there is nothing to prevent savings and loan associations from being organized today.

JUDGE MAYER: Well, can they incorporate under the same plan as a savings and loan association?

MR. GRIFFIN: No, sir. This plan is a lottery.

MR. BURDEN: Then all I have said is true.

JUDGE MAYER: So the question before us is 475
this: The statute prohibits this business?

MR. GRIFFIN: This particular development of the business?

JUDGE MAYER: I mean this particular business.

MR. GRIFFIN: It forbids this contract, of course.

JUDGE MAYER: Well, if it forbids the contract, then this is absolutely prohibited by the statute? 476

MR. GRIFFIN: Yes.

JUDGE COOPER: Well, doesn't it go further, and doesn't it prevent any individual or individuals from doing any building and loan business?

477 MR. GRIFFIN: Yes, sir.

JUDGE COOPER: Whether under that contract, or any other contract?

MR. GRIFFIN: Yes, or any other contract. If you want to take periodical payments for loaning money on mortgages, on the installment plan, the State of New York has nicely mapped out within the Four Corners of the Article relating to Savings and Loan Associations, just exactly how you must do it, and what supervision you must consent to, and you cannot write any other kind of a contract,
478 any more than a savings bank can promise to pay one hundred per cent.—

JUDGE MAYER (Interrupting): Well, don't you see that this Act discriminates between corporations and individuals?

MR. GRIFFIN: Well, I was just going to get to that. Now, that is just what I want to get to. My friend says his constitutional right is invaded because the statute has denied the right to carry on a savings and loan association business,
479 and has confined it to associations organized under the law.

JUDGE COOPER: To corporations.

MR. GRIFFIN: To corporations, and only corporations are allowed under the law, and savings banks must be corporations, and the national banks must be corporations,—and he says his constitutional right is invaded because of that demand, and he cites the Scougal case in Dakota, and he might have found one other, the Nebraska case, which I
480 have upon my brief. They are anomalous, and I simply want to read from the decision of Mr. Justice Holmes in Shallenberger against Nebraska, decided immediately after the Nebraska Guaranty

Law went into effect. It is on page ten of my 481
brief.

At the beginning of the Shallenberger against
Nebraska case, Mr. Justice Van Devanter sat as
Circuit Court Judge with two District Judges, and
in writing the opinion that court held that the pro-
vision of the statute of Nebraska requiring incor-
poration by all persons doing a banking business
was unconstitutional. The requirement of guar-
antee of bank deposits by corporations was like-
wise in the case. The Court below also held that 482
the provision requiring guarantee of bank deposits
was unconstitutional. When that question came
before the United States Court, the question of the
guarantee of bank deposits, was decided in favor
of the statute's constitutionality in Noble State
Bank against Haskell. Then followed the Shallen-
berger case, and I want to read Judge Holmes'
opinion to The Court.

Mr. Justice Holmes delivered the opinion of The
Court: 483

"This is a suit by many banks to prevent the
Banking Board of Nebraska from carrying out and
enforcing an act similar to the Oklahoma statute
just passed upon. It forbids banking except by a
corporation formed under the act and provides for
a guaranty fund. The Circuit Court held the stat-
ute unconstitutional and issued an injunction
against the enforcement of it. 172 Fed. Rep. 999.
For the reasons given in the foregoing case (Noble
State Bank v. Haskell) dealing with guaranty of 484
deposits (219 U. S. 104) the decree of the Circuit
Court must be reversed. "Decree reversed."

JUDGE COOPER: Now, those two decisions

485 referred to; were they on the guaranty part of it, or the incorporation part of it?

MR. GRIFFIN: Well, the District Court declared the statute unconstitutional. When you come to read 172 Federal, it is upon the ground that the state could not require an individual to incorporate if he was going to go into the banking business, and second on the ground that the guaranty of bank deposits was made, but you will notice that the United States Supreme Court refused to
486 take their opinion as to that. It must have gone on both grounds.

JUDGE HAND: Do you say, Mr. Griffin, that this statute prohibits the ordinary, we will say, small transaction in a country town where a man loans money on building contracts, and then makes a second loan, makes his advancements as the building goes up?

MR. GRIFFIN: Oh, I think not, Your Honor.

JUDGE HAND: I do not mean the single
487 transaction, but where it has the elements of a business.

MR. GRIFFIN: No. This is a co-operative loan business, and there must be a co-operative feature in it, and I think that such a man is merely there loaning money, and we have not attempted to interfere with that business. We haven't interfered with individuals doing a loaning business of that kind.

JUDGE MAYER: Well, following up what
488 Judge Hand said, you remember that last part of the statute that I quoted before?

MR. GRIFFIN: Yes. I have it here.

JUDGE MAYER: Now, let us take up the question as to the manner in which this statute is

divided. The words "or promise to make loans 489 at any time," etc., etc., etc.; now, that stands by itself.

MR. GRIFFIN: That goes back, of course, to "nor shall any such unauthorized individual," and so forth.

JUDGE MAYER: Well, "nor shall any such unauthorized individual," that means any person who is a private banker, or some other person under existing law.

MR. GRIFFIN: Under one of the articles of 490 the banking law.

JUDGE MAYER: Yes. All right. Now, the way that is framed, it means that Bill Brown, the comfortable local man, perfectly familiar to many of the communities of this State, cannot make loans of any kind, in any manner, or of any description.

MR. GRIFFIN: Oh, Your Honor, I do not construe it so, and it has not been so construed.

JUDGE MAYER: In instalments of less than five hundred dollars.

MR. GRIFFIN: Your Honor, we do not construe it so and would not so enforce it, and we further say, Your Honor, that Bill Brown is not a party plaintiff here. 491

JUDGE MAYER: No, no, but I will get to the party plaintiff by means of Bill Brown, who is a very familiar figure.

MR. GRIFFIN: He is not a plaintiff here in a court of equity. I do not want to go into that phase of it, if I can avoid it. 492

JUDGE MAYER: Well, it has got this much to do with it, anyway: That if this plaintiff comes under that section. I do not say he does not come under other sections, but if he comes under that

493 section, because he is a trustee, how do you get him under that part of the statute.

MR. GRIFFIN: Well, in the first place, by the reference back. The advertising feature is not here. But, "nor shall any such unauthorized individual," and that, of course, goes back, and it means a trust, or otherwise.

JUDGE MAYER: That does not make any difference, as I pointed out.

494 MR. GRIFFIN: In conducting a business similar to the business of a savings bank, or a savings and loan association.

JUDGE MAYER: I am not asking you about that.

MR. GRIFFIN: I misapprehended Your Honor's question.

JUDGE MAYER: I am trying to see whether we understand this statute. Now, the statute is really divided into four parts, and the first part is the top of it. Have you got it?

495 MR. GRIFFIN: Yes, sir. That is the provision against encroachment.

JUDGE MAYER: Yes. It reads: "Except as hereinbefore authorized, no individual, either for himself or as trustee, and no partnership, or unincorporated association, shall engage in the business of receiving deposits of money or payments of money in instalments, for co-operative, mutual loan, savings or investment purposes in sums of less than five hundred dollars each under a declaration of trust or otherwise." Then your
496 point too is the advertising, which I understand is not in this case.

MR. GRIFFIN: No, not particularly. Of course, they do advertise, I suppose.

JUDGE MAYER: Now, the third part of the 497
statute is where they say they shall not engage in
or conduct a business similar to the business of a
savings bank or of a savings and loan association,
and the fourth part of the statute is this language
to which I have heretofore referred, "Or a promise
to make loans at any time," and so forth; do you
see that?

MR. GRIFFIN: Yes.

JUDGE MAYER: Toward the end there, and 498
that would seem to prohibit an ordinary loan on
the instalment plan on a bond or mortgage issue,
which, of course, has always been done to help
erect a building, or to do anything else.

MR. GRIFFIN: Of course, that was not and is
not contemplated, and I have discussed the matter
with the Superintendent of Banks. Why, the ques-
tion was brought up before the Governor at a hear-
ing that stocks and bonds could not be sold on the
instalment plan under this. But, we always come 499
back, first to our title, and second to our general
words, and that these simply are meant to be spec-
ific as to this kind of unauthorized individuals do-
ing a co-operative business. That is what we are
doing.

JUDGE MAYER: Well, you limit the statute
to that.

MR. GRIFFIN: Yes, sir, that is, in its actual
operations. And, in this particular case, I want to
be insistant that the Mutual Benefit League of 500
North America cannot come in here and stand in
the place of Bill Brown to Whom Your Honor has
referred.

JUDGE MAYER: Well, you are quite right

501 about that. You are quite right about that. But, our questions are only to test it.

MR. GRIFFIN: I see.

JUDGE MAYER: Now, it is your assertion, as I understand it, that this plaintiff is a trustee, if you please, or an individual who—

MR. GRIFFIN (Interrupting): And I want to call your attention to this right now, before I forget it; Now, the trust agreement is not here, but the trust agreement that I have seen, not of this
502 particular company, but, under that one, they can have every power in the world and there is no restriction on what they can do.

JUDGE MAYER: What is meant, then, if somebody that engages in or conducts a business similar to the business of a savings bank or a saving and loan association?

MR. GRIFFIN: Yes.

JUDGE MAYER: That is to say, who receives money.

503 MR. GRIFFIN: Yes, sir.

JUDGE MAYER: Referring to your definition, now.

MR. GRIFFIN: Yes.

JUDGE MAYER: Which receives money and then which pays it out from time to time for and in connection with building.

MR. GRIFFIN: Yes, sir, that is it.

JUDGE MAYER: Now, let me ask you this: What would you say as to the existing contracts that they have, as distinguished from future business?
504

MR. GRIFFIN: Well, as to the existing contracts, of course the statute simply forbids the acquisition of new business, and if these people are

solvent, as they claim they are, I think that they 505
 can immediately convert into a savings and loan
 association and give certificate. Of course, under
 the Pennsylvania law that they have asked us to
 adopt as a regulatory measure, when they have
 gone out of business they sold out to a mortgage
 company at about sixty per cent of the face value,
 and so forth, and things have gone pretty bad, but
 I think, assuming the good faith of this Mutual
 Benefit Company of North America, that they can
 convert into a savings and loan association, or can 506
 liquidate.

JUDGE MAYER: That does not answer the
 question. Assuming they have a hundred contracts
 and that it takes eight years to fulfill some of them,
 and they have made the contracts with A, B, and C,
 and all the rest of the alphabet.

MR. GRIFFIN: They cannot go on with that
 contract, I will answer that directly.

JUDGE MAYER: What is the theory of that?

MR. GRIFFIN: Well, now, the theory of that 507
 is, because the business has not been fully explain-
 ed to Your Honor.

JUDGE MAYER: I mean, what is the consti-
 tutional end of it?

MR. GRIFFIN: The constitutional theory is
 that the protection against the impairment of the
 obligation of a contract in the original constitution
 was merely in connection with one form of prop-
 erty that was protected against destruction by the
 States, and which was later, in the Fifth Amend- 508
 ment, which prevented Congress from destroying
 any kind of property. Now, when the Fourteenth
 Amendment was enacted, the due process of law
 inhibition was placed—

509 JUDGE MAYER (Interrupting): It is not a question of due process, is it?

MR. GRIFFIN: I think it is.

JUDGE MAYER: Is it your proposition, if I make a contract, which is lawful today, that the Legislature of New York can step in and prohibit my carrying out that contract?

510 MR. GRIFFIN: If Your Honor will pause and reflect, for just a moment, you will recall that contracts are so dealt with. For instance, the provision as to a pass given on a railroad. Now, we say that this contract was made subject to regulations.

JUDGE MAYER: Now, just what is the theory of that?

MR. GRIFFIN: Why, because any contract is made subject to such regulation as the State may later adopt.

JUDGE MAYER: Yes, but regulation and prohibition are two entirely different things.

511 MR. GRIFFIN: Well, we refused to grant that there is prohibition here. Merely this kind of business is prohibited, merely doing business this way.

JUDGE MAYER: I would like you to point out a case to me, speaking for myself, where a perfectly lawful contract, when made, may be impaired and destroyed by any State legislation, as distinguished from subjecting it to the supervision of some State official.

512 MR. GRIFFIN: Well, for instance, take the two-cent fare contract. That was destroyed by regulation.

JUDGE MAYER: What is that?

MR. GRIFFIN: The State of New York had a contract with the railroads at two cents a mile

across the State, and that contract was made in 1854, and it must have been made under the supposition that Congress might later, in the act of regulation, destroy the contract and provide that the fare should be 3.6 per mile. 513

JUDGE MAYER: That is not in line at all.

MR. GRIFFIN: I think it is, Your Honor.

JUDGE MAYER: They are two utterly different things.

MR. GRIFFIN: Well, take the contracts that were in existence in the Shallenberger case. That bank was closed up and they had contracts for deposits. 514

JUDGE HAND: Do you know that?

MR. GRIFFIN: What is that?

JUDGE HAND: Do you know that that question as to the existing business was at all involved in that case?

MR. GRIFFIN: It must necessarily have been involved. Deposits were made.

JUDGE COOPER: Any suggestion of a building and loan business there? 515

MR. GRIFFIN: Now, let us get back to the facts. I am arguing on the law, and our points of view are at variance. Let us get to the facts as far as this particular contract is concerned. I say that these people can go ahead in a lawful manner, but, under their present scheme, the only way in which they can carry out their contract, is not to go on with this particular Bill Brown, we will say, who has a contract with them, but they have got to go out and get new business with other contract holders, in order to pay Bill Brown what they promise to loan him. 516

JUDGE MAYER: That is a practical ques-

517 tion in which we are only indirectly concerned.
 There is a line of cleavage in cases of this general
 character between what shall be prohibited in the
 future and at the same time preserving the exist-
 ing rights. I confess that it comes to me with quite
 a shock, speaking for myself, to hear it proposed
 or advanced that a man in a mutual association,
 or anything else, who has made a contract that is
 lawful under the laws of the State, that the State
 can then come along and stop that contract and
 518 impair its validity, when it was lawful there before.
 The State can say, apparently, within certain limit-
 ations, you can never make such a contract again,
 and if these gentlemen, as they say, can liquidate,
 and they say they can, under their existing situa-
 tion, to restrain them from collecting further
 moneys, would not only seriously affect them, but
 seriously affect the unfortunate poor people who
 contracted with them.

MR. GRIFFIN: I think Your Honor is per-
 519 fectly right, and for the purposes of the argument
 I will now make the concession upon the record
 that, so far as this contract is concerned with any-
 one of these individuals, merely, of course, for the
 purposes of argument, and I am not making this as
 a concession or stipulation, as a matter of fact,
 but, so far as any contract they have written is
 concerned, they can go right ahead and carry it
 out; but we simply get back where we started, that
 they cannot carry out any contract, unless they
 keep on going the way they are.

520 JUDGE MAYER: That is a practical question
 they have got to meet.

MR. GRIFFIN: That is the only way they can
 carry out their contracts. Now, Your Honors, so

far as the Superintendent of Banks is concerned, 521
at this time, he is not doing anything except preventing the writing of new business since June first.

JUDGE COOPER: What you mean is that your construction of this statute is that it applies only to contracts made after the enactment of the statute, after it took effect?

MR. GRIFFIN: But, I might find it profitable, because I disagree with Your Honors' view of the law,—I think that you could prevent the operation of future lotteries. I think there is no lottery statute in this State and we could close up the Albany Baseball Pool tomorrow. 522

JUDGE COOPER: The what?

MR. GRIFFIN: I think we could close up the Albany Baseball Pool tomorrow. I do not care if they have contracts, standing for the next twenty years, if they are a lottery, if they are as immoral and reeking with constructive fraud as are these contracts here. I think the police power always destroys property and always impairs contracts, under such circumstances. But, I think that that question, and what I am trying to show is that that question is not here in the case as to whether or not they can carry out these contracts. I am here to say that we are here to prevent them from writing a single new contract since June first, and that is what we are doing. 523

JUDGE HAND: Are you satisfied to consent to a restraining order as to business existing when this statute went into effect? 524

MR. GRIFFIN: No, sir. I do not think it is in the case.

JUDGE MAYER: Why not?

525 MR. GRIFFIN: Because I think we have got a right to prevent the old business from being carried on, but, as a matter of fact, we are not going to do it, because we know that if we can prevent the writing of new business we can close this thing up. We know they cannot go on with this business without new customers. They cannot loan a cent until they get a new customer. Mr. McLaughlin has looked at this from a practical point of view and he is proceeding accordingly. The Court may not appreciate that.

526 JUDGE MAYER: Well, this Court is a reasonably practical Court.

MR. GRIFFIN: But, Your Honors once told me that was a practical question.

JUDGE MAYER: Well, the point Judge Hand asked you about is this: What objection is there, in any event, restraining the operation of the act in respect of those contracts actually entered into and existing, and you said something about the first
527 of June?

MR. GRIFFIN: Yes. On the first of June the act was effective.

JUDGE MAYER: Oh, I see.

MR. GRIFFIN: Yes. The Governor signed it on that day. Now, I think that these peoples' money should be returned to them immediately. They have been lead into a fraudulent scheme in which they cannot get a loan at three per cent. Notwithstanding it is a three per cent loan contract, and it so reads, the only persons who can
528 get a three per cent loan is the one who is lucky enough to have the first contract. Some of these people will have to pay up to sixty-one per cent of

the value of the loan, and they will have to go on 529
for eight years.

JUDGE MAYER: What is that?

MR. GRIFFIN: I said that some of these
people would be compelled to pay up to sixty-one
per cent, if they were allowed to carry their con-
tracts right through, and yet they write on the
face of the contract, "3% Loan Contract."

JUDGE MAYER: Yes, but you see, Mr. Grif-
fin, we must impress upon you that while you may
look at the matter practically, from the standpoint 530
of the office charged with the enforcement of such
laws, and while I haven't any doubt whatever that
the Superintendent of Banks, with his wide ex-
perience, is actuated by the highest purposes, we
cannot be guided and controlled by what the Super-
intendent of Banks might feel advised to do in di-
rectly this, that and the other thing. We can only
look at the limitations or the extensions of the
statute as the case may be.

MR. GRIFFIN: Well, I simply submit, on the 531
face of the contract that these people present to
you, that under the exercise of the police power,
the State of New York had power, not only to pre-
vent the writing of new business, but that it had
the power to destroy and do away with the business
that had been written, or was in existence. Now,
that is my proposition.

JUDGE MAYER: I never expect to live to see
the day when any Court will look upon that prop-
osition as sound.

MR. GRIFFIN: Well, as I understand it, Your 532
Honors will enter a decree?

JUDGE MAYER: We will let you know in a
few minutes.

533 MR. BURDEN: I did not get what Your Honor said at the very last there.

JUDGE MAYER: I said, in somewhat more elaborate language, that that would not do; that that was not the law, as I understand it.

MR. BURDEN: Yes.

MR. GRIFFIN: Now, if I may say one word as to the form the decree would take, as what would be meant by old business, as a practical matter, if I may refer to that again.

534 JUDGE MAYER: After we have heard the arguments, we will have a conference.

JUDGE HAND: Mr. Griffin, I want to ask you another question. You call this a lottery, and all sorts of things.

Now, what do you mean by that, just in a word or two?

MR. GRIFFIN: Well, I can give it to you in this way: Each holder of a contract is to pay ten dollars for one hundred months. That is eight
535 years and a fraction. He is to have a loan in accordance with the day, hour and minute that his application is received.

JUDGE HAND: No, but—

MR. GRIFFIN (Interrupting): Just a moment, if Your Honor please. The day, hour and minute that his application is received, which is a roll up, or endless chain scheme. Of course, there is not going to be any money there until after the first five months. They cannot make loans until
536 after five months, and there is not going to be money enough for all, and so only a few will get it, and they will get it at three per cent, and the others will have to wait. Contractor number one hundred and forty will have to wait until eight years

before there will be any money in the fund which 537
 he can borrow. In other words, he has to wait eight
 years. If he stops his payment, after he has paid
 in a hundred or a hundred and fifty dollars, what
 he gets back is contingent upon the trust being will-
 ing to give it to him, and there is certain paid up
 values and certain sale values in the contract, and
 that is all contingent on the fund. An examination
 of the contract will show it. Now, nothing is pro-
 mised, except, if you are lucky enough to file one
 of the first few applications you can get money at 538
 three per cent. as a loan on a particular piece of
 property, and it is not described at all, and if they
 want to give it to you they will give it to you at
 three per cent. If you are number one hundred and
 forty, or a hundred and twenty, or number a hun-
 dred, you will probably have to let your money lie
 there until it has accumulated sixty-one per cent
 interest. They will have the use of the money and
 you won't get your interest back.

JUDGE HAND: If under that arrangement 539
 their business was stopped and these existing con-
 tracts, which have been going on for two years,
 rolled up two million dollars, how would you pro-
 pose that they liquidate, without impairing every-
 body's rights.

MR. GRIFFIN: Well, they would give the
 money right back. That is all they can do, just as
 a loan association, for instance. Of course, you
 get right back to this point again; just as soon as
 you stop the roll up and the acquisition of new busi- 540
 ness, that is the end of it, and nothing left, nothing
 left except the trust fund minus the expenses. The
 first four and a half months paid in is taken for
 expenses.

541 JUDGE COOPER: In the absence of this statute, assuming that this proposition continues, at the end of the eight years, what would the non-borrowing contract holder get?

MR. GRIFFIN: He would get a loan of a thousand dollars.

JUDGE COOPER: A loan?

MR. GRIFFIN: Yes, sir.

JUDGE COOPER: He would get a loan of a thousand dollars?

542 MR. GRIFFIN: Yes, sir.

JUDGE COOPER: How much has he paid in during that time?

MR. GRIFFIN: He pays in eight hundred and ten dollars and gets a thousand dollars.

JUDGE COOPER: Gets it back absolutely as liquidation, or cancellation of his contract, or merely as a loan?

543 MR. GRIFFIN: After a thousand dollars is paid, he has got a cash surrender value of eight hundred and forty dollars.

JUDGE COOPER: Eight hundred and forty dollars?

544 MR. GRIFFIN: Yes. It has a paid up certificate value of a thousand dollars, and he has got a temporary loan value of five hundred dollars, but remember that everything in this contract is contingent upon the money being there, and no personal liability on the trustees, and no promise to do it, and providing they like the property and the property is situated where they want it. But, again, Your Honors, there is no time anywhere when any one of these people can come to this company, and say, "I want my money." If they come to them

and ask them for their money, they can say, "You 545 cannot have any money."

JUDGE MAYER: That hasn't anything to do with it.

MR. GRIFFIN: Well, I think we are not impairing an obligation of a contract that is so wanting in mutuality as that.

MR. BURDEN: I will answer all of these outlandish suggestions about the contract in the answering affidavit.

JUDGE MAYER: We may want to take this 546 matter under advisement now.

MR. BURDEN: Then, I would like to answer it now.

JUDGE MAYER: Very well, take your time.

MR. BURDEN: If Your Honors please: This tabulation shows exactly what each contract holder in the Series gets, what they always will get and always have gotten, and there are the different sources of income and profit, and it all goes into these different funds, named in the contract, and 547 it is there and it is very very clear.

I can only say that the Superintendent of Banks has not investigated this subject with an actuary, or he would not make these statements.

I now state that we are prepared to demonstrate that every contract holder gets exactly what this tabulation shows he gets in addition to the profits. It is not a lottery. I have spent a great deal of time on the subject, and there are cases aplenty, if my friend will take the time to find them, that hold 548 that a lottery must have three necessary elements. I will only take a moment with this. I can state a great many cases on this subject, and this has been distinctly held not to be a lottery, because it

549 does not combine the necessary three elements of a lottery, which are the offering of a prize, the furnishing of a consideration and the distribution of the prize by chance, rather than entirely upon the basis of merit.

These applications come in and they are numbered in the order in which they are received by the solicitor, in the order in which they are taken. There is no element of chance whatever, and it has been held in 181 Federal, and in many cases here, 550 that this is absolutely not a lottery, and it is unfair, and it is an exhibition of ignorance on the part of the person to state that this contract before the Court is fraudulent, or that it is not fair.

We cannot do business under the building and loan association regulations, because their method is different. Their method of obtaining money is different. Their method of distributing the money is different, and so forth. There are certain elements of this contract that are attractive to business men, and professional men, to the laboring 551 men, and to all kinds of men, including bankers.

It is not a lottery. It is not a gamble. It is an absolute contract and they get a certain advantage at times by reason of the order in which their application is taken, and at times their loan contract is sold at an advantage, at a profit, and these men keep absolute books. They are audited every month, and they are kept in better shape under the nature of their agreement or trust, and under 552 their contract with their contractors, than most of the building and loan associations.

Now, I am surprised that the Superintendent of Banks takes the position that he does here today. I do not want to prejudice the Court in any way, or

attempt to, but I simply say here that this is a matter of insistence on the part of the Superintendent of Banks that he can strangle and put out of business, not only our company, but all the rest of them. 553

Now, we are not interested in the rest of them. We are perfectly selfish here in protecting our contract owners and protecting our trust here, our common law trust. They will benefit by the position of this Court ultimately, and we hope that, as a result of intelligent discussion and investigation, this will lead to regulation and classification, 554 so that the good ones may survive, and the bad ones may go, and that is what we have been trying to do for two years here, to get some regulation. The animus behind it is based upon some contention or other of the building and loan association, who are our competitors, and who contend that we ought to be put out of business so that they can be favored, if you please. Competition is the life of trade, in business and in banking. There is nothing holy about the banking business. It is a business, just as much as any other business, and it is not entitled to any more discrimination than the grocery business, or the wholesale business, or the drug business, or the making of oleomargarine, or the making of cigars and all these various other things. 555

It is not lottery. It is no gamble. It is fair. It is equitable, and I will endeavor to demonstrate it in my answering affidavits, now that we have been attacked in this fashion. It has destroyed a large part of my argument which was planned on an orderly presentation, and I will do my utmost in my answering affidavits to answer such statements and assertions as have been made here. 556

557 We come down now to the opinion of the Attorney General here, that we have not been regulated. Why? Because we are not under the Banking Law. They are trying to put us out of business now because we are operating as a common law trust, and under the cases cited in my brief, and under the cases with which Your Honors are entirely familiar, it cannot be done in this way, and it is not fair to try to do it. It is not fair to stand here in a Constitutional Court and accuse us of fraudulent
 558 scheme when they haven't any typewritten figures. They have not asked us for any assistance or information, other than what we have furnished, and apparently they have not acted on that.

We ask for the privilege of carrying out our contract with our contract owners under the constitution of the United States, irrespective of the State of New York, and under the decisions of the Court. Then, if they cannot do it that way, let them regulate us as they ought to.

559 JUDGE COOPER: Suppose The Court should hold against you, that your constitutional right was invaded by depriving individuals of a right to do business which is granted to corporations, or to private bankers under regulation; suppose we should also hold against you, that the five hundred dollar loan was a constitutional loan, and was not discrimination; are there any other constitutional phases of it?

560 MR. BURDEN: Yes. It impairs the validity of the contract and denies us the equal protection of the laws. I have all of that in my brief.

JUDGE MAYER: Where do you come out, practically, if you were to succeed in keeping the existing contracts valid and alive?

MR. BURDEN: Well, it would destroy our 561
future business, and we would come out at the middle end of the horn, as far as salary is concerned. That is all.

JUDGE MAYER: What I am getting at is, can you carry out your contracts?

MR. BURDEN: Oh, yes. We could liquidate.

JUDGE MAYER: I understood you to say in opening that you could.

MR. BURDEN: We can liquidate at any time. We are not here begging. And we can wind up. 562
But, as to the existing contracts here, about which you have answered, I don't know where we would land on that. They ought to make their payments in here, in order to complete these Series, don't you see? That is part of the contract with its contract owners with us. You have got to have the payments coming in, and you have got to keep on getting other people to take the places of those people who lapse, or your Series are not complete. You cannot complete a series here, if we are stop- 563
ped and we must immediately discontinue the business.

JUDGE COOPER: Wouldn't that merely mean a little more time?

MR. BURDEN: Yes.

JUDGE COOPER: If you have got a hundred and forty contracts, and suppose forty of them default.

MR. BURDEN: Yes.

JUDGE COOPER: All your hundred have to 564
do is to pay a little longer time?

MR. BURDEN: Yes.

JUDGE COOPER: In fact, they don't have to pay the longer time, if the hundred mature.

565 MR. BURDEN: It regulates itself, but it takes more time.

JUDGE COOPER: Well, it might take more time to mature, and it might take more time to make your loans?

MR. BURDEN: Yes, sir.

JUDGE COOPER: But, if you forget the loans and only think of the contracts themselves, why wouldn't one hundred mature in eight years, as well
566 as a hundred and forty would mature in eight years.

MR. BURDEN: I should think they would. That is correct.

JUDGE COOPER: In speaking for myself, I simply wanted for my own information to know what other constitutional points you wanted to press here, other than the discrimination against the individual and the five hundred dollars and the impairing the obligation of existing contracts?

567 MR. BURDEN: Yes. If they had given us time to wind up, there would be something sensible and reasonable about it, but the result of this method is receivership, scandals, and a lot of other things, and a lot of poor people would be hit, not only our company, but all the rest of them. As I said before, I don't know anything about these other companies. I am not interested in them. Some borrowed my papers. They are liable to be in here with their troubles, and it was argued be-
568 fore the Governor and brought out concisely that this hits real estate transactions, and a lot of other things. It is a loosely drawn statute. I understand it was not drawn by the Bill Drafting Commission, the regular channel through which legis-

lation comes, but it was drawn on the outside and 569
rushed through the legislature in this form.

MR. GRIFFIN: The Superintendent of Banks
has requested me to state, that there may be no
misrepresentation and misunderstanding, that this
bill was drawn with the full knowledge of the Sup-
erintendent of Banks, after long and careful con-
sideration, and introduced in the Senate on April
4th, and it was not signed by the Governor until
June first. Many hearings were held. This law
is the result of deliberate action on the part of the 570
Superintendent of Banks and the Legislature, and
it is hardly fair to say that the Superintendent of
Banks has shifted his position, or has been misin-
formed, or that the bill was badly drafted.

There is only one other point which I did not
argue and which I had on my notes, and which
was brought up. Of course, my brief on this whole
subject is much fuller, and we brief this as a Four-
teenth Amendment case, and that largely arose
from a typographical error, and on that point, I 571
refer Your Honors to my brief.

Now, my friend said something about going on,
and you asked him about this practical point. Now,
I do not believe he can go on, because somebody
has got to pay the expense, and the only way to
pay the expense is by getting new business, and of
all new business, the first four and a half payments,
forty-five dollars, comes off for the payment of
expenses, and I do not know who is going to run
this trust, if there is no new business acquired, 572
because you cannot pay the expenses. Of course,
they can do anything under a trust of this kind.

JUDGE COOPER: Well, where do the moneys
come from to pay the rent and the salaries and the

573 employees and the telephones and other expense of this organization?

MR. GRIFFIN: That all comes out of the contract. Forty-five dollars is taken out for the payment of expenses.

JUDGE COOPER: Out of the contract?

MR. GRIFFIN: Yes.

JUDGE COOPER: Is that right, Mr. Burden?

MR. BURDEN: Yes, and it is limited by the agreement of trust and by our contract, and we
574 can only take three-eighths of one per cent. for expenses in the Series. It is absolutely and carefully drawn as an agreement of trust, and it is a carefully drawn contract here, when you examine it.

JUDGE MAYER: I am requested by one of my associates to ask you this question. Maybe the Superintendent or the Deputy may know, if you do not know this. How many of these trusts are there?

575 MR. GRIFFIN: I know there are fifteen of them, and they claim to have assets of twenty-five million dollars, insofar as the face value of their contracts is concerned.

JUDGE MAYER: Now, suppose we say, for the sake of argument, that the existing contracts are permitted to be finished, but that no further business is permitted to be done, pending the trial of causes. Now, this is only argumentative. Now, what can be done to save, evidently, many small
576 people who put their money in these trusts; what is the practical solution?

MR. GRIFFIN: Well, Your Honor, where these companies have run up against the Blue Sky Laws in some twenty states, they either appointed

a receiver, or liquidated. There is no practical 577
 solution for carrying on this kind of business,
 because you always get back to the point of the
 acquisition of new business, which is necessary. It
 is an endless chain proposition.

JUDGE MAYER: I wonder if you will ask the
 Superintendent if there is any practical thing that
 his department can do.

MR. GRIFFIN: Well, we have talked this
 over, and, of course, I suggested once that they
 should organize as loan association and issue cer- 578
 tificates in place of what they have already issued,
 and the other is that the quicker they can get their
 money back, the more the depositors will get.

JUDGE HAND: Does it appear from the
 papers here how much money and property you
 have got?

MR. BURDEN: We have some two hundred
 and fifty thousand dollars investment in first
 mortgage loans. We have about one hundred thou-
 sand dollars cash, between sixty and a hundred 579
 thousand, I am informed. That has gone up since
 this was started, and there are seven millions of
 dollars of contracts out.

JUDGE HAND: So, you have apparently
 about three hundred fifty thousand dollars of act-
 ual cash and mortgages?

MR. BURDEN: Yes, sir, and then we have
 some assets that are stated in the moving papers.
 I can state it quickly, I think. Our assets consist
 of office furniture,—I will read it from the papers: 580

“FOURTH: Plaintiff operating under said
 agreement and declaration of trust, the substan-
 tial provisions of which are embodied in Schedule
 B hereto annexed, owns valuable assets, to wit:

581 Cash in bank approximating \$75,000.11; first mortgages on real estate approximating \$220,000.00; office equipment, supplies, and so forth, approximating \$15,000.00; contracts with contract holders approximating \$7,000,000.00."

And then on page 44:

582 "Plaintiff operating under said agreement and declaration of trust, owns valuable assets, including as aforesaid, first mortgages on real estate approximating \$220,000.00; contracts with contract holders approximating \$7,000,000.00, and also has cash in bank approximating \$75,000.00, and office equipment and supplies of the value of \$15,000.00; and in addition, the good will of its business; also a trained organization and working force. Plaintiff has no liabilities."

583 JUDGE HAND: Have you any definite authority of any kind on the position you take that this can be applied to existing contracts? Of course, that is directly contrary to every principle of constitutional law and involves the impairment of contract relations.

MR. GRIFFIN: Well, my view of the thing is this, and here is the proposition advanced before: A man was injured on a railroad and he lost his leg, and the road said, instead of paying him damages, they would give him a pass for life, and they passed the Interstate Commerce Act and took the pass away from him.

JUDGE MAYER: Well, I hardly think that is to the point.

584 MR. GRIFFIN: I think it is, if Your Honor please.

JUDGE MAYER: Well, now, we will confer, and you gentlemen better wait, and then we will

tell you what disposition we will make as to further 585
briefs, and inform you as to our views. I do
not know what we will do until we confer.

(The Court retired at 12:30 P. M. and returned
to the court room at 12:45 P. M.)

JUDGE MAYER: Mr. Griffin, as I understood
you to say, the Act went into effect on June 1st?

MR. GRIFFIN: June first is the date that the
Governor signed it.

JUDGE MAYER: And have you the chapter
number? 586

MR. GRIFFIN: Chapter eight hundred and
ninety-five of the laws of 1923, amending section
one hundred seventy-four of the Banking Law.

JUDGE MAYER: The Judges have conferred
and are ready to render their decision. As two of
us are from out of this District, we feel that it will
aid Counsel and litigants if we do this: Render a
prompt decision, because all of us feel that we
understand the situation.

The motion, as everyone knows, is for a prelim- 587
inary injunction to restrain the operation of a
State statute, as it affects this plaintiff. The
statute is chapter 895 of the Laws of 1923.

In the first place, we are of the opinion that, in-
sofar as it would be attempted to apply this statute
to contracts between the plaintiff and its contract-
ing parties, existing on June 1, 1923, the date when
the Act became law, insofar as any efforts were
made to disturb those contracts, such would be un-
constitutional. We construe the Act as in no man- 588
ner capable of impairing the obligations of the
contracts then existing.

In respect of future business, our view is that,
so far as it affects this plaintiff, the Act is constitu-

589 tional. We are of the opinion that the Legislature has the power to classify in a class by themselves, individuals, trustees, partnerships or unincorporated associations, to do the kind of business referred to in the statute. We are of the opinion also that the classification of five hundred dollars is constitutional and not arbitrary, and that there is no constitutional invasion in classifying, or determining what individuals, trustees, partnerships or unincorporated associations, who are
 590 engaged in the kind of business described in the statute, may not do the business referred to in the statute.

The effect of our decision, therefore, for the time being at least, until final decree and ultimate decision by the Supreme Court, if the case be carried there, to leave unimpaired and unaffected the contracts existing as of June 1, 1923, and we shall issue our injunction in that respect, and we shall not issue any injunction in regard to contracts or
 591 transactions of the character described in the statute, which may have taken place after June 1, or which may hereafter take place.

We think it advisable, however, to call attention to the last provision of the statute, or the last clause, which reads:

“Nor shall any such unauthorized individual, trustee, partnership or unincorporated association engage in or conduct a business similar to the business of a savings bank or of a savings and loan
 592 association, or promise to make loans at any time, either fixed or uncertain, upon real estate security for building, home-owning, savings, or investment purposes as an inducement for the payment of such sums of money in installments of less than five hun-

dred dollars each to any such unauthorized person, 593
trustee, partnership or unincorporated association."

We gather from what the Deputy Attorney General stated, that it was intended to apply this provision to individuals making loans of the character described, where such individuals do not do a business similar to the business of a savings bank, or a savings and loan association, or do not engage in the business of receiving deposits of money, or payments of money in installments for co-operative 594
mutual loans and savings and investment purposes, and so forth.

Our view is, this provision of the statute must be construed, in order to be held valid, as referring, and be limited as referring to the persons designated by the statute as "unauthorized individuals, trustees, partnerships or unincorporated associations," engaged in the businesses described by and in the statute. We think that that may be important in order to assure the private persons that they 595
are free to make an ordinary loan on security as heretofore, in installments, where the amount is less than five hundred dollars, and we understand that that is the position that the Attorney General takes, and we have felt it desirable to so state in order to obviate any misapprehension hereafter.

Now, finally, we know nothing of the history that led up to this legislation. We hope that there is no feeling of such antagonism between the Superintendent of Banks and these mutual associations, 596
that the public officials and authorities and the representatives of these associations will be prevented from conferring and getting together with a view to solving the problems which the statute has pro-

597 duced, in such a manner as will safeguard, to the greatest measure, and with the very least expense, the interests and the rights of what presumably are a considerable number of people of humble means who have contributed their installments in this and similar matters.

Now, we do not offer any suggestion. That is not within our province. We are not as fully acquainted with the problem as must necessarily be the Superintendent of Banks, and as probably
 598 are the officers of this association. We are very much concerned that this legislation shall not work any more hardships than is possible to avoid upon what may be a considerable number of people, and, therefore, we have gone a little out of our way to assume, and we feel with much confidence, that the Superintendent of Banks will do all in his power to co-operate with the plaintiff, if the plaintiff will be co-operated with, and, if not, that he will take such course as will protect, as we have
 599 said before, this considerable number of people. We hope that, if there is any past history between the parties, it shall be forgotten. I do not know whether there is or not.

Now, if Mr. Burden desires to file his affidavits that he spoke of, we shall receive them, nevertheless, in order that he may have his record. We decide now, because we feel that there is no question of fact which has affected our judgment, and we have dealt only with questions of law. Yet, it
 600 is but fair that you may have time to file your reply affidavits.

Now, of course, you can go direct from our decree to the Supreme Court, but you will there be met with the fact that our decree is in some respects

discretionary, speaking in the legal sense, and that 601
 a court of this character hesitates to declare an act
 unconstitutional, when, of course, there is an inher-
 ent presumption of validity in every legislative act,
 and while it is no affair of ours, I think that per-
 haps there is a most effective way, on final hear-
 ings, and that would be to go direct to the Supreme
 Court from the final decree.

Now, you said something about existing con-
 tracts.

MR. GRIFFIN: Well, I referred to the deed 602
 of trust, I think, Your Honor. That is not here.
 That is what I wanted to see more than anything
 else, and then I want to see their actual form of
 doing business.

JUDGE MAYER: Now, can't you and Mr.
 Burden try to get together on the form of decree?

MR. GRIFFIN: Yes.

MR. BURDEN: Yes.

JUDGE MAYER: Judge Hand and I will be
 very glad to defer our return until late this after- 603
 noon, and if you and Mr. Burden can agree on the
 form of decree, we will remain over and sign it.

MR. GRIFFIN: I will try and have it here at
 half-past two.

JUDGE MAYER: And leave a blank for your
 reply affidavits.

MR. GRIFFIN: Yes.

MR. BURDEN: Yes.

JUDGE MAYER: Now, when do you want for 604
 your reply affidavits?

MR. BURDEN: I am afraid I cannot get them
 out today.

JUDGE MAYER: We did not ask you to.

605 MR. BURDEN: I am ready to go on with two trials right away.

JUDGE MAYER: Well can you get them out and send them here to the clerk by Friday?

MR. BURDEN: Oh, yes.

JUDGE MAYER: Well, then, what we will do is this: If the form of the decree is agreed on, we will take the decree with us, and as soon as we are advised that the reply affidavits have been filed, you
606 can send a note, giving the dates of your affidavit.

MR. BURDEN: Yes.

(Further discussion outside the record, which the Stenographer was directed not to take.)

(At 1:00 P. M., The Court adjourned, the form of decree to be submitted to The Court at 3:00 P. M. by Messrs. Burden and Griffin.)

607

608

At a term of the United States District Court, 609
for the Northern District of New York, held
on the 25th day of June, 1923, at the Federal
Building, in the City of Albany, New York.

PRESENT:

HON. JULIUS M. MAYER,
Circuit Judge, Presiding,

HON. AUGUSTUS N. HAND,
HON. FRANK COOPER, 610
District Judges.

JAMES B. DILLINGHAM, as President; SYL-
VANUS B. NYE, as Vice-President; FRED-
ERICK A. BALLOU, as Secretary and Treas-
urer, and each of them as Trustees of the
Mutual Benefit League of North America, op-
erating under an agreement and declaration
of trust,

VS

GEORGE V. McLAUGHLIN, as Superintendent 611
of Banks of the State of New York and CARL
SHERMAN, as ATTORNEY GENERAL of
the State of New York, et al.

This cause came on to be heard at this term and
was argued by counsel, and thereupon, upon con-
sideration thereof it was

ORDERED, ADJUDGED AND DECREED,
as follows, that the plaintiffs prayer for a prelim-
inary injunction is denied, except that until the 612
final decree herein, the defendants herein are
enjoined from prosecuting this plaintiff, and
enforcing the provisions of Chapter 895 Laws 1923,
against plaintiff as to contracts actually entered

613 into on or before June 25, 1923. Leave for modification may be applied for on July 6, 1923, at 2 P. M.

Dated, Albany, N. Y., June 25, 1923.

JULIUS M. MAYER,

Circuit Judge.

AUGUSTUS N. HAND

District Judge, Southern District of New York.

614

FRANK COOPER,

District Judge, Northern District of New York

MUTUAL BENEFIT LEAGUE OF NORTH
AMERICA,

Plaintiff,

vs

GEORGE V. McLAUGHLIN, as Superintendent
of Banks of the State of New York, et al.

615

Defendants in Error.

Application for modification denied.
July 9, 1923.

J. M. M., C. J.

A. H. H., D. J.

F. C., U. S. D. J.

STATE OF NEW YORK 617
 UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF NEW YORK
 MUTUAL BENEFIT LEAGUE OF NORTH
 AMERICA, *Plaintiff,*

vs

GEORGE V. McLAUGHLIN, as Superintendent
 of Banks, of the State of New York, CARL
 SHERMAN, as Attorney General of the State
 of New York, et al. *Defendants.*

PETITION FOR APPEAL TO THE SUPREME 618
 COURT OF THE UNITED STATES

The above named plaintiff conceiving itself
 aggrieved by the decree herein made and entered
 on the 25th day of June, 1923, and upon which
 application for modification was denied on July
 9, 1923, in the above entitled cause, does hereby
 appeal from said orders and decrees to the Supreme
 Court of the United States, for the reasons speci-
 fied in the assignment of errors, which is filed here-
 with, and prays that this appeal may be allowed, 619
 and that a transcript of the record proceedings and
 papers upon which said orders were made, duly
 authenticated, may be sent to the Supreme Court
 of the United States, and that a bond on appeal
 herein is hereby waived.

Dated this 13th day of July, A.D. 1923.

The foregoing claim of appeal is allowed.

Dated July 13th, 1923.

OLIVER D. BURDEN,
Attorney for Plaintiff. 620

FRANK COOPER,
 United States District Judge.
 AUGUSTUS N. HAND,
 United States District Judge.

621 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MUTUAL BENEFIT LEAGUE OF NORTH
AMERICA,

Plaintiff,

vs

GEORGE V. McLAUGHLIN, as Superintendent
of Banks, of the State of New York, CARL
SHERMAN, as Attorney General of the State
of New York, et al.

Defendants.

622

ASSIGNMENT OF ERRORS ON APPEAL
FROM A CONSTITUTIONAL COURT SIT-
TING IN THE NORTHERN DISTRICT OF
NEW YORK TO THE SUPREME COURT
OF THE UNITED STATES

623 The plaintiff prays an appeal from the orders
and decrees of the Constitutional Court sitting in
connection with the District Court in and for the
Northern District of New York to the Supreme
Court of the United States and assigns for error:

FIRST: That the said act of the legislature of
the State of New York, being Chapter 895 of the
Laws of 1923 of the State of New York, passed
June 2, 1923, is in contravention of the constitution
of the United States, especially of the Fourteenth
Amendment thereof, and others.

624 SECOND: That the said Act is in contraven-
tion of the Constitution of the State of New York,
especially of Section 6 of Article 1 thereof.

THIRD: That the said act is unreasonable and
confiscatory and the enforcement of the same
against plaintiff and its contract owners will

deprive it and them of its and their property without due process of law; take their property without just compensation; deny to plaintiff and its contract holders the equal protection of the law; also that said statute absolutely prohibits any individual or group of individuals from engaging in a private business, which, under the terms of said act is admittedly legitimate and lawful, and permits corporations to do the very things which, by its terms, individuals are forbidden to do. 625

FOURTH: That said act, if enforced, constitutes governmental interference which disturbs the normal adjustment, making and consummation of legal acts, legally entered into, and will derange the business of the plaintiff, its contract owners and other persons, and actually threatens confiscation of their property. 626

FIFTH: That unless plaintiff is permitted to carry out the provisions of its said contracts with its said contract owners, and particularly, to continue its business in accepting repayment of principal and interest upon mortgages, and in accepting payment on contracts already written, and is permitted to enter into contracts to make loans on real estate, and to make loans on real estate with monies of contract holders already accumulated, there will be an interference, particularly with the options accruing to contract holders under the provisions under Section Six of the Loan contract, "Schedule B", annexed to the complaint, which will result in irreparable loss and damage to the plaintiff and its contract owners; that unless plaintiff is permitted to carry out its contracts, the results will be disastrous to plaintiff, depriving it of a reasonable return upon its surplus, reserve 627 628

629 fund, expense reserve fund, and trust fund, accumulated for the benefit of its said contract holders, and cause plaintiff to wind up and discontinue the business conducted by it.

SIXTH: That the Court erred in denying the plaintiff's prayer for a preliminary injunction until the final decree herein.

SEVENTH: That the Court erred in denying
630 the application of plaintiff for a modification of the order and decree made herein on June 25th, 1923.

EIGHTH: That the Court erred in denying plaintiff's application for an interlocutory injunction suspending and restraining the enforcement of Chapter 895 of the Laws of 1923 of the State of New York, pending the final decree in this suit, and in refusing to enjoin and restrain, pending such
631 final decree, the defendants from acting under and by virtue of the authority of said alleged statute and from enjoining the defendants from in any way enforcing or attempting to enforce against the plaintiff the provisions of said act.

WHEREFORE Plaintiff prays that the orders and decrees of the said Constitutional Court sitting in connection with the District Court for the Northern District of New York be reversed.

632

OLIVER D. BURDEN,

Solicitor for Plaintiff,

Office and Post Office Address,

914-918 University Block,

Syracuse, New York.

CITATION TO APPELLEES ON APPEAL 633
 FROM THE DISTRICT COURT FOR THE
 NORTHERN DISTRICT OF NEW YORK
 (SITTING AS A CONSTITUTIONAL
 COURT) TO THE SUPREME COURT OF
 THE UNITED STATES.

TO THE SUPREME COURT OF THE UNITED
 STATES,

THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF
 NEW YORK UNITED STATES OF 634
 AMERICA, SECOND CIRCUIT.

TO GEORGE V. McLAUGHLIN, as Superintend-
 ent of Banks of the State of New York, CARL
 SHERMAN, as Attorney General of the State
 of New York, et al.

YOU ARE HEREBY CITED and admonished
 to be and appear in the Supreme Court of the
 United States at the City of Washington, in the
 District of Columbia thirty (30) days after the
 date of this citation, pursuant to an appeal allowed 635
 and filed in the Clerk's Office of the United States
 District Court for the Northern District of New
 York (Second Circuit) wherein the Mutual Benefit
 League of North America is appellant and you are
 appellees, to show cause, if any there be, why the
 decree entered against the said appellant, as in
 said appeal mentioned, should not be corrected and
 why speedy justice should not be done to the party
 in that behalf.

Witness the Honorable Frank Cooper, District 636
 Judge of the United States District Court for the
 Northern District of New York, (Second Circuit)
 this 23d day of August, 1923.

FRANK COOPER,
 United States District Judge.

637 IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
NEW YORK

JAMES B. DILLINGHAM, as President; SYLVANUS B. NYE, as Vice-President; FREDERICK A. BALLOU, as Secretary and Treasurer and each of them as Trustees of the Mutual Benefit League of North America, operating under an agreement and declaration of trust,

Plaintiff-Appellant,

638

against

GEORGE V. McLAUGHLIN, as Superintendent of Banks of the State of New York and CARL SHERMAN, as ATTORNEY GENERAL of the State of New York, et al.

Defendants-Appellees.

639 The above named plaintiff-appellant having on the 13th day of July, 1923, appealed and Frank Cooper, United States District Judge for the Northern District of New York having granted in the nature of a citation to the above named defendants-appellees, and service of the said citation having been admitted by the said defendants-appellees, NOW

640 GEORGE V. McLAUGHLIN, as Superintendent of Banks of the State of New York; CARL SHERMAN, as Attorney-General, personally, and as Attorney-General of the State of New York, and all of the other defendants-appellees in the above entitled matter, feeling themselves aggrieved by a portion of the preliminary injunction, order or decree, of the District Court, (sitting as a Constitutional Court), dated June 25th, 1923, and

affirmed upon application for modification on July 641
9th, 1923, enjoining the said defendants-appellees
from prosecuting the plaintiff and enforcing the
provisions of chapter 895, Laws 1923, against
plaintiff as to contracts actually entered into on or
before June 25th, 1923, and refusing the relief
demanded in the defendants-appellees answer, and
their answering affidavits upon the hearing for a
preliminary injunction herein, by their counsel,
pray, appeal and cross-appeal to the Supreme
Court of the United States from that said part of 642
said preliminary injunction, order or decree.

The particulars wherein the defendants-Appellees, and cross-appellees construed said injunction, order or decree erroneous are set forth in the assignment of errors now on file in this Court and to which reference is made.

And, the said cross-appellees further pray that transcript of the records, proceedings, affidavits, exhibits and papers on which said injunction, order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States and the cross-appellees further pray that citation issue as provided by law, and that the proper order touching 643

645 security to be required of them to perfect their
cross-appeal be made.

CARL SHERMAN,

Attorney-General of the State of
New York, Attorney-General and
Solicitor in person for defendants
herein.

EDWARD G. GRIFFIN, and

616

CHARLES E. McMANUS,

Deputies Attorney-General of the
State of New York of counsel.

CHARLES W. HIGGISON,

Clerk of the District Court for the
Northern District of New York.

Filed this 25th day of August, 1923.

617

648

IN THE UNITED STATES DISTRICT COURT 649
COURT FOR THE NORTHERN DISTRICT
OF NEW YORK

JAMES B. DILLINGHAM, as President; SYLVANUS B. NYE, as Vice-President; FREDERICK A. BALLOU, as Secretary and Treasurer and each of them as Trustees of the Mutual Benefit League of North America, operating under an agreement and declaration of trust,

Plaintiff-Appellant,
against 650

GEORGE V. McLAUGHLIN, as Superintendent of Banks of the State of New York and CARL SHERMAN, as ATTORNEY GENERAL of the State of New York, et al.

Defendants-Appellees.

COME NOW, GEORGE V. McLAUGHLIN, as Superintendent of Banks of the State of New York, CARL SHERMAN, as Attorney-General of the State of New York, et al., defendants-appellees, and by their solicitors and in connection with their petition for cross-appeal, file the following assignment of errors on which they will rely upon said cross-appeal to the Supreme Court of the United States from the injunction order or decree of the said District Court, (sitting as a Constitutional Court), entered June 25th, 1923, and order denying application for modification entered July 10th, 1923, in the above entitled cause. 651

The District Court erred:

I.

In enjoining the defendants-appellees from prosecuting the plaintiff-appellant and enforcing the provisions of Chapter 895, Laws of 1923 of the State of New York, against plaintiff-appellant, as 652

653 to its contracts actually entered into on or before
June 25th, 1923.

II.

In holding unconstitutional Chapter 895, Laws of 1923, of the State of New York, as against contracts of the plaintiff actually entered into on or before June 25th, 1923.

WHEREFORE, the defendants-appellees pray that the following part of said injunction, order or decree of the District Court (sitting as a Constitutional Court), entered June 25th, 1923, to wit;
654 except that until the final decree herein, the defendants herein are enjoined from prosecuting this plaintiff, and enforcing the provisions of Chapter 895, Laws of 1923, against plaintiff as to contracts actually entered into on or before June 25th, 1923, be reversed, annulled and set aside and that the District Court, (sitting as a Constitutional Court) be instructed to enter such decree as is prayed for by the answer herein and to deny the prayer for
655 relief in the plaintiff-appellant complaint and that such other and further order be made as may be appropriate.

CARL SHERMAN,

Attorney-General of the State of
New York, Attorney-General and
Solicitor, in person for defendants-
appellees herein.

, **EDWARD G. GRIFFIN, and**
CHARLES E. McMANUS,

656 Deputies Attorney-General of the
State of New York, Counsel.

CHARLES W. HIGGISON,
Clerk of the District Court.

Filed this 25th day of August, 1923. /

On the 23rd day of August, 1923, a judicial date 657
of the regular 1923 term of this Court at the
United States Court House in the City of
Binghamton for the Northern District of
New York.

PRESENT:

HON. FRANK COOPER,
District Judge, Presiding.

JAMES B. DILLINGHAM, as President; SYL- 658
VANUS B. NYE, as Vice-President; FRED-
ERICK A. BALLOU, as Secretary and Treas-
urer and each of them as Trustees of the
Mutual Benefit League of North America, op-
erating under an agreement and declaration
of trust,

Plaintiff-Appellant,

against

GEORGE V. McLAUGHLIN, as Superintendent 659
of Banks of the State of New York and CARL
SHERMAN, as ATTORNEY GENERAL of
the State of New York, et al.

Defendants-Appellees.

In the above entitled cause the plaintiff-appellant
having made and filed their petition on appeal and
the citation having been issued thereon to the
Supreme Court of the United States from the in-
junction, order or decree from the District Court
for the Northern District of New York, (sitting as
a Constitutional Court), entered June 25th, 1923, 660
and application for modification thereof denied
July 9th, 1923, and order on such denial entered
July 10th, 1923, and the above named defendants-

661 appellees having filed their petition on appeal for
a cross-appeal from a portion of said injunction,
order or decree, and also having made and filed an
assignment of errors and having conformed in all
respects to the statutes and rules of the Court in
such cases made and provided, it is

ORDERED AND DECREED that the cross-
appeal be and the same is hereby allowed as appro-
priate and made returnable on the day of
662 1923, and the clerk is directed to
transmit forthwith a properly authenticated trans-
cript of the records, proceedings, affidavits, exhibits
and papers to the Supreme Court of the United
States.

FRANK COOPER,

United States District Judge of the
Northern District of New York.

663

.....

Clerk of the District Court of the
Northern District of New York.

Filed this 23rd day of August, 1923.

664

IN THE UNITED STATES DISTRICT COURT 665
OF THE NORTHERN DISTRICT OF
NEW YORK

JAMES B. DILLINGHAM, as President; SYLVANUS B. NYE, as Vice-President; FREDERICK A. BALLOU, as Secretary and Treasurer and each of them as Trustees of the Mutual Benefit League of North America, operating under an agreement and declaration of trust,

Plaintiff-Appellant,

666

against

GEORGE V. McLAUGHLIN, as Superintendent of Banks of the State of New York and CARL SHERMAN, as ATTORNEY GENERAL of the State of New York, et al.

Defendants-Appellees.

UNITED STATES OF AMERICA—ss:

TO THE SUPREME COURT OF THE UNITED 667
STATES.

The United States District Court for the Northern District (sitting as a Constitutional Court), of New York, Second Circuit, to JAMES B. DILLINGHAM, et al., trustees of the MUTUAL BENEFIT LEAGUE OF NORTH AMERICA, operating under an agreement and declaration of trust

You are hereby cited and admonished to be and appear in the Supreme Court of the United States 668 at the City of Washington, District of Columbia, thirty days' after the date of this citation, pursuant to the cross-appeal allowed and filed in the clerk's office of the United States District Court

669 for the Northern District of New York (Second
 Circuit) wherein the said MUTUAL BENEFIT
 LEAGUE OF NORTH AMERICA, as plaintiff-
 appellant and GEORGE V. McLAUGHLIN, as
 Superintendent of Banks, State of New York,
 CARL SHERMAN, Attorney General of the State
 of New York, et al., are appellants to show cause,
 if any there be, why that part or portion of the
 injunction, order or decree, entered in this Court
 June 25th, 1923, in the said clerk's office and modi-
 670 fication thereof denied July 9th, 1923, and order
 denying modification entered July 10th, 1923, as
 in said cross-appeal mentioned, should not be cor-
 rected and why speedy justice should not be done
 to the parties in their behalf.

WITNESS, HONORABLE FRANK COOPER,
 District Judge of the United States District Court
 for the Northern District of New York Second
 Circuit), this 23rd day of August, 1923.

671

FRANK COOPER,
 United States District Judge.

672

STIPULATION AS TO RECORD

673

SUPREME COURT OF THE UNITED STATES
MUTUAL BENEFIT LEAGUE OF NORTH
AMERICA,

Plaintiff in Error,

against

GEORGE V. McLAUGHLIN, as Superintendent
of Banks of the State of New York, et al.

Defendants in Error.

674

Stipulated by and between the respective solicitors for all of the parties appearing herein that the foregoing record is complete and contains all of the proceeding heretofore had and taken herein. Dated September 18th, 1923.

OLIVER D. BURDEN,

Solicitor for Plaintiff in Error.

675

EDWARD G. GRIFFIN,

*Deputy Attorney-General of New
York, and Solicitor for Defendants
in Error.*

676

677 No.....

I, CHARLES W. HIGGISON, Clerk of the United States District Court for the Northern District of New York do hereby certify that in compliance of the praecipies filed herein and stipulation made and attached hereto, the foregoing record has been made; and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said Court as mentioned in said praecipies and stipulations in the case of James B. Dillingham, as President, et al, as Trustees of the Mutual Benefit League of North America, &c. vs George V. McLaughlin, as Superintendent of Banks, of the State of New York, et al.

679

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
NEW YORK

WITNESS my hand and the seal of the said Circuit Court at Utica, in said District this... day of September, 1923.

680

Charles W. Higginson
Clerk.

[illegible]

[illegible]

Year	Month	Day	Time	Location	Remarks
1901	Jan	1	10:00	San Francisco	Arrived from New York
1901	Jan	2	11:00	San Francisco	Left for New York
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Chart No 3

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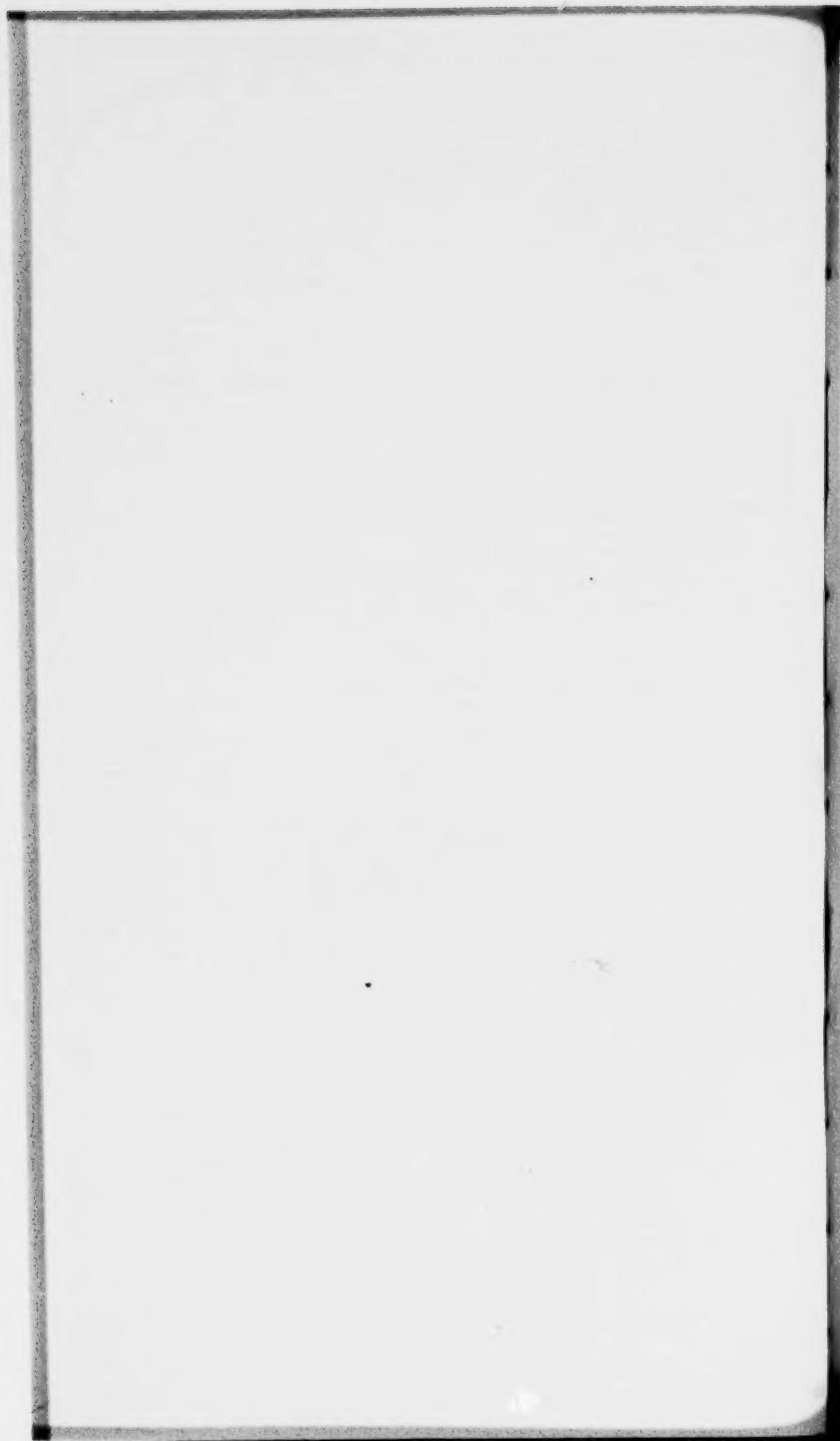
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4-126 PEARL ST

BUFFALO, N. Y.

Endorsed on cover: File Nos. 30,000, 30,001. N. New York D. C. U. S. Term No. 690. James B. Dillingham, as president; Sylvanus B. Nye, as vice-president; Frederick A. Ballou, as secretary, etc., et al., appellants, vs. George V. McLaughlin, as Superintendent of Banks of the State of New York; Carl Sherman, as Attorney General of the State of New York. Term No. 691. George V. McLaughlin, as Superintendent of Banks of the State of New York; Carl Sherman, as Attorney General of the State of New York, appellants, vs. James B. Dillingham, as president; Sylvanus B. Nye, as vice-president; Frederick A. Ballou, as secretary, etc., et al. Filed December 10th, 1923. File Nos. 30,000, 30,001.

(2053)



Argued by
Oliver D. Burden,
Syracuse, N. Y.

Nos. 690 & 691.

Supreme Court of the United States

Office Supreme Court, U. S.

FILED

DEC 22 1923

WM. R. STANSBURY
CLERK

JAMES B. DILLINGHAM, as President; SYLVANUS B.
NYE, as Vice-President; FREDERICK A. BALLOU,
as Secretary and Treasurer, and each of
them as Trustees of the MUTUAL BENEFIT
LEAGUE OF NORTH AMERICA, operat-
ing under an agreement and
declaration of trust,

Plaintiffs-Appellants and Cross Appellees,

vs

GEORGE V. McLAUGHLIN, as Superintendent of Banks
of the State of New York and CARL SHERMAN,
as Attorney General of the State of New York,
Defendants-Appellees and Cross Appellants.

BRIEF AND ARGUMENT FOR APPELLANTS

Jerry A. Lyon,
OLIVER D. BURDEN,
Solicitor and Counsel for Appellants,
Office and P. O. Address,
914-918 University Block,
Syracuse, N. Y.



SUBJECT INDEX

*

- I. Statement of the casepp 1-10
 - (a) Succinct presentation of questions involvedpp 1- 4
 - (b) Manner in which questions involved were raised ..pp 4-10
 - (c) Statute involvedpp 1- 2
 - (d) Specification of Errors ..pp 8-10
 - (e) Order appealed from ...p 10
- II. Point I. The act in question discussed and cases citedpp 11-22
- III. Point II. Power of Federal Courts to grant injunctions ...pp 22-24
- IV. Point III. Police Power of State Subject to Constitutional Limitationspp 24-29
- V. Point IV. A Similar Case on Confiscationp 29
- VI. Point V. Referring to regulatory Statute in State of Pennsylvania on similar situations ..pp 29-30
- VII. Point VI. Business of plaintiff not a lotterypp 30-63
- VIII. Point VII. Referring to Regulatory Statutes in other states ..pp 63-64

LIST OF CASES

	PAGE
Adair vs. U. S., 208 U. S., 161	21
Boyd vs. U. S., 116 U. S., 635	21
Brooklyn Daily Eagle vs. Voorhis, 181 Fed., 579	30, 34
17 Ruling Case Law, 1222	34
Burks vs. Harris, 91 Ark., 205	31
Colon vs. Lisk, 153 N. Y., 188	27
Chaney Park Land Co. vs. Hart, 104 Iowa, 592	44
Curtis vs. Leavitt, 15 N. Y., 9, 60	17
Consolidated Laws of New York, McKinney Vol. 1, Statutes p. 75—par. 20	18
p. 153—par. 86	18
Dickerman vs. Northern Trust Co., 176 U. S., 181	41
Eastman vs. Armstrong-Boyd Music Co., 212 Fed., 662	30, 34, 47
Equitable Loan & Security Co. vs. Waring, 62 L. R. A. (Ga.)	30, 34, 39, 60
Exparte Shobart, 70 Calif., 632	59
Gilman vs. Tucker, 122 N. Y., 190, 200	27
Great American Home Savings Institution vs. Lee, 233 S. W., 20	36
Hartung vs. People, 26 N. Y., 167	18
Holden vs. Hardy, 169 U. S., 366	21
Hammer vs. Dagenhart, 247 U. S., 251	22
Hauser vs. North British Insurance Co., 206 N. Y., 455	24
Health Department vs. Rector, 145 N. Y., 32.	27

III.

Horner vs. U. S., 147 U. S., 449	32, 58
Hohn vs. Koehler, 96 N. Y., 36	59
Hobbs vs. McLean, 117 U. S., 567	61
Inigley vs. Thatcher, 207 N. Y., 66	19
Jacob Hoffman Co. vs. McElligott, 259 Fed., 525	22
Lochner vs. New York, 198 U. S., 64	21
Lawton vs. Steel, 152 U. S., 137	21
Lawton vs. Steel, 152 U. S., 133	27
Lauder vs. Leoria Agricultural & Tracting Society, 71 Ill. App., 475	47
Livingston vs. Livingston, 173 N. Y., 377 ...	18
Mains vs. Baltimore R. R. Co., 175 N. Y., 409	19
Matter of Russell, 158 N. Y., 162	28
Matter of Jacobs, 98 N. Y., 98	12, 16
Matter of Co-operative Law Co., 198 N. Y., 479	17
Mongeon vs. People, 55 N. Y., 613	18
McKinney, Statute of New York, Vol 1, p. 73, par. 18	19
Opinion Atty. General (N. Y.) 1909, 350 ...	19
Oregon R. & Nev. Co. vs. Dumes, 181 Fed., 781 (C. C. A.)	62
People vs. Marcus, 185 N. Y., 257	21
People vs. Williams, 189 N. Y., 131	21
People vs. City Prison, 144 N. Y., 529	24
People vs. C. Klinck Packing Co., 214 N. Y., 121	25
People vs. Griswold, 213 N. Y., 92	25
People vs. Gillson, 109 N. Y., 389	14, 27, 28
People ex rel Tryoler vs. Warden of City Prison, 157 N. Y., 116	15, 27
People vs. Byrne, 163 N. Y., 682	28

IV.

People vs. Jenkins, 202 N. Y., 93	28
People vs. Greene, 85 A. D., 400 (N. Y.) ...	28
People vs. Falls, 152 N. Y., 12	48
People vs. Marx, 99 N. Y., 377	12, 16
People ex rel Moskowitz vs. Jenkins, 202 N. Y., 53	15
People vs. Erie R. R. Co., 198 N. Y., 369, 367	17
People vs. Doty, 80 N. Y., 225	17
Perkins vs. Smith, 116 N. Y., 44 1.	17
People vs. O'Brien, 111 N. Y., 1	19
Russell vs. Equitable Loan & Security Co., 199 Ga., 154	34, 38, 43
Stuart vs. Palmer, 74 N. Y., 183	27
State vs. Clark, 33 N. H., 329	31
State vs. Lipkin (N. C.) 84 S. E., 340	32
State vs. Mumford, 73 Mo., 647	32
Schmaier vs. Navare Hotel et Co., 182 N. Y., 83	15
State vs. Seougal, 3 South Dakota, 55	16
Truax vs. Raich, 239 U. S., 33	22
U. S. vs. Purvis, 195 Fed., 618	30, 34, 55
U. S. vs. Zeisler, 30 Fed., 499	59
Village of Phoenix vs. Gannon, 195 N. Y., 471	17
Wright vs. Hart, 182 N. Y., 330	21
Wilson vs. Mew., 243 U. S., 332	23
Weed & Co. vs. Lockwood, 250 U. S., 104 ...	23, 24
Weed & Co. vs. Lockwood, 266 Fed., 785 ...	23, 24
Washington Class Co. vs. Mosbaugh, 19 Ind. App., 105	44
Walters vs. Evergreens, 47 N. Y., 216	19
Zeigler vs. Ill. Trust & Savings Bank, 245 Ill., 180	62

Argued by
Oliver D. Burden,
Syracuse, N. Y.

JAMES B. DILLINGHAM, as President;
SYLVANUS B. NYE, as Vice-President;
FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them as Trustees of the MUTUAL BENEFIT LEAGUE OF NORTH AMERICA, operating under an agreement and declaration of trust.

Plaintiffs-Appellants and Cross Appellees

vs

GEORGE V. McLAUGHLIN, as Superintendent of Banks of the State of New York and CARL SHERMAN, as Attorney General of the State of New York.

Defendants-Appellees and Cross Appellants

STATEMENT OF THE CASE

A succinct presentation of the questions involved compels the setting forth of the statute passed by the Legislature of the State of New York approved by the Governor of said state June 2, 1923 and taking effect immediately, being Chapter 895 of the Laws of New York of 1923, entitled:

"An act to amend the Banking Law in relation to encroachment of individuals as trustees or otherwise upon powers of private banks, savings banks or savings and loan associations", amending or purporting to amend Article 4, of Chapter 369 of the Laws of 1914, entitled "An Act in relation to banking corporations, individuals, partnerships,

incorporated associations, under the supervision of the Banking Department, constituting Chapter 2 of the Consolidated Laws", adding or purporting to add thereto a new section to be Section 174, to read as follows:

"Section 1. Article four of chapter three hundred and sixty-nine of the laws of nineteen hundred and fourteen, entitled 'An act in relation to banking corporations individuals, partnerships, unincorporated associations and corporations under the supervision of the banking department, constituting chapter two of the consolidated laws' is hereby amended by adding thereto a new section, to be section one hundred and seventy-four, to read as follows:

174. Prohibitions against encroachment by individuals as trustees or otherwise upon certain powers of private bankers, of savings banks or savings and loan associations. Except as hereinbefore authorized, no individual, either for himself or as trustee, and no partnership or unincorporated association, shall engage in the business of receiving deposits of money or payments of money in installments, for co-operative, mutual loan, savings or investment purposes in sums of less than five hundred dollars each under a declaration of trust or otherwise, and no person shall within this State, either personally or by the publication or circulation of advertisements solicit the deposit of money with or the payment of money to, any such unauthorized individual, trustee, partnership or unincorporated association in sums of less than five hundred dollars each or the execution of a declaration of trust to or a contract with, any such unauthorized individual, trustee, partnership or unincorporated association, under which such deposits or payments of money in instalments of less than five hundred dollars will become due and payable; nor shall any such unauthorized individual, trustee, partnership or unincorporated association engage in or conduct a business similar to the business of a savings bank or of a savings and loan association,

or promise to make loans at any time, either fixed or uncertain, upon real estate security for building, home-owning, savings or investment purposes as an inducement for the payment of such sums of money in instalments of less than five hundred dollars each to any such unauthorized person, trustee, partnership or unincorporated association.

Any person who shall violate any provision of this section shall be guilty of a misdemeanor.

2. This act shall take effect immediately".

The application to the Court, constituted in the manner prescribed in Section 266 of the Judicial Code of the United States, cited the defendants to show cause why an order should not be made suspending and restraining the enforcement of Chapter 895 of the Laws of 1923 of the State of New York pending the final decree in this suit, and enjoining and restraining, pending such final decree, them, their, and each of their successors, deputies, assistants, employees and any and every person acting and purporting to act under and by virtue of the authority of such Chapter of the Laws of 1923 of New York, or any other provision of law, from in any way enforcing or attempting to enforce against the plaintiffs the provisions of said act or from instituting or causing to be instituted any suit, action or criminal proceeding to enforce the said statute, or from doing any acts or things interfering with the right or authority of the plaintiff *to engage in the business of receiving deposits of money or payment of money in instalments or from soliciting by the publication or circulation of its literature, the deposit of money with or the payment of money to it in sums of less than \$500 each, or from entering into contracts with present or prospective contract holders, under which payments of money in instalments of less than \$500 may become due and payable, or to make loans upon real estate security for*

building, home-owning, savings or investment purposes; further, from doing any acts or thing interfering with the right or authority of the plaintiff to accept payment of principal and interest upon mortgages held by it, or to accept payment on contracts already written by it, or to enter into contracts and make loans on real estate, or to make loans on real estate with money already accumulated by it, or to do any act or thing which it might lawfully do if the provisions of said act had not been enacted, and were not operative, and for such other, further or different relief as the Court shall deem just and proper in the premises.

The manner in which the questions involved were raised appears in the bill of complaint and the supporting affidavits of the plaintiffs. The bill of complaint (Folios 73 to 120) sets forth that the plaintiffs filed in office of the Clerk of the County of Erie, New York on the 28th day of July, 1921, an agreement and declaration of trust; that plaintiffs were operating as a common law trust; (Folios 297 to 336) for the purpose of furnishing to contract owners, at low cost, financial assistance with which to buy or build homes, or otherwise improve real estate, and that since July 28, 1921, they have been and still are engaged in said business under said agreement and declaration of trust; that the primary object of plaintiffs is to loan to contract owners money to enable them to own homes; that in order to create funds with which to make loans, all contract owners make monthly deposits of one per cent. of the face value of their contract, and take turns in borrowing as the money is accumulated; that no outside capital is employed, as the League is simply the medium which brings the co-operators together and enables them to assist one another; that the business of the League is managed by three trustees, and their

work is subject to the approval and recommendation of an Advisory Board of Contract Owners; that trust or loan funds created by the monthly deposits of all contract owners are loaned only to contract owners at three per cent. annual interest; that all loans are secured by first mortgages on improved real estate (Folios 76 to 79).

It appears that during the period of its existence plaintiff has issued contracts to contract holders to the number of approximately nine thousand; that the amount of loans made on first mortgages at three per cent. by plaintiff and still outstanding approximates two hundred and twenty thousand dollars; that the aggregate amount represented by contracts already written during the period of the existence of plaintiff, face value, approximates seven million dollars (\$7,000,000.00), which amount, when all paid in under the contracts as written, will be available for loans to contract owners. (Folios 80 to 82).

It further appears that contracts (in the form annexed to the bill of complaint, "Schedule B", pp 46, 47) are issued in units of any amount from \$100.00 up and are placed in series of approximately \$140,000.00, total face value; that each series is entirely separate from all others, and accumulates funds from its own depositors only; that these contracts from plaintiff so entered into with its contract owners are negotiable; that the owner may sell his contract at any time, either before or after maturity, and if he does not wish to use a loan himself he may sell his privilege to borrow to another, thus realizing a profit (Folios 80 to 81).

A copy of the standard form used by plaintiff during the term of its existence for application for a three

per cent. loan contract is annexed to the complaint and marked "Schedule A" (pp 45, etc.).

It appears that the plaintiff so operating under said agreement and declaration of trust, owns valuable assets, to wit: cash in bank approximating seventy-five thousand dollars (\$75,000.00) (Folio 174), first mortgages on real estate approximating Two Hundred Twenty thousand Dollars (\$220,000.00); office equipment, supplies, etc. approximating fifteen thousand dollars (\$15,000.00); contracts with contract holders approximating Seven Million Dollars (\$7,000,000.00); that plaintiff employes directly and indirectly, upon part time and whole time, approximately two hundred (200) persons, (Folios 82 to 83).

It appears that the territory served by the plaintiff comprises a large number of counties in the State of New York; that there has been an increase in its business during its existence; that the same continues to increase from day to day in the amount of monies handled, number of contracts written, and number of loans made, and a continuous increase in capital, surplus and reserve fund of the plaintiff is occurring.

It is claimed and contended in the bill of complaint and the affidavits filed by plaintiff that the provisions of said purported act and statute are unreasonable and confiscatory and that the enforcement of such statute against the plaintiff will deprive it of its property without due process of law; that such statute is in violation not only of the constitution of the State of New York, but is in violation of the constitution of the United States in that it impairs the obligations of plaintiff's contractual rights; in that the enforcement thereof will deprive plaintiff and its contract owners of its and their property without due process of law; take their property without just compensation, and

deny to plaintiff and its contract owners the equal protection of the law; that said statute absolutely prohibits an individual or a group of individuals from engaging in a private business, which, under the terms of said act, is admittedly legitimate and lawful, and permits corporations to do the very things, which, by its terms individuals are forbidden to do; that said statute, if enforced, constitutes governmental interference, which disturbs the normal adjustment, making, and consummation of legal contracts, legally entered into, and will derange the business of plaintiff, its contract owners and other persons and actually threatens confiscation of their property; that unless plaintiff is permitted to carry out the provisions of its contracts with its contract owners, and particularly to continue its business in accepting repayment of principal and interest, upon mortgages, and in accepting payment on contracts already written, and is permitted to enter into contracts to make loans on real estate, and to make loans on real estate with monies of contract owners already accumulated, there will be an interference particularly with the options accruing to contract holders under the provisions of Section 6 of Loan Contract, Schedule B, annexed to the complaint (pp 46 to 48), which will result in irreparable loss and damage to the plaintiff and its contract owner, and that unless plaintiff is permitted to carry out its contracts, the result will be disastrous to plaintiff, depriving it of a reasonable return upon its surplus, reserve fund, expense reserve fund, and trust fund, accumulated for the benefit of its said contract holders, and cause plaintiff to wind up and discontinue the business conducted by it. (Folios 95 to 98).

That the provisions of said Chapter 895 of the Laws of 1923 of New York prohibiting the plaintiff from prosecuting its said business are arbitrary and unreasonable and deprive plaintiff of its property without

due process of law, amount to the taking of property of plaintiff and its contract owners without compensation and is an undue interference with the rights and liberty of contract between plaintiff and its contract owners; that the attempted prevention of business by plaintiff exposes plaintiff to a multiplicity of actions for the recovery of penalties for a violation of the statute, and of its contracts aforesaid, and to a multiplicity of proceedings for the enforcement thereof, involving its alleged non-compliance with the statute, with its contract obligations, to the great and irreparable damage and injury of the plaintiff, for which it has no adequate remedy at law or otherwise than in this suit. That the penalties and punishment prescribed for its violation are so oppressive and burdensome as to result in the partial destruction and confiscation of the property of plaintiff and its contract owners.

The usual relief was prayed for during the pendency of this suit.

A specification of errors relied on and brought up by the appeal and writ of error involves, inasmuch as there is a cross appeal herein, the entire ruling of the Constitutional Court. The errors asserted and intended to be urged by Plaintiff in error-appellant, as set out separately and particularly, is as follows:

First: That the said act of the legislature of the State of New York, being Chapter 895 of the Laws of 1923 of the State of New York, passed June 2, 1923, is in contravention of the constitution of the United States, especially of the Fourteenth Amendment thereof, and others.

Second: That the said act is in contravention of the Constitution of the State of New York, especially of Section 6, of Article 1 thereof.

Third: That the said act is unreasonable and confiscatory and the enforcement of the same

against plaintiff and its contract owners will deprive it and them of its and their property without due process of law; take their property without just compensation; deny to plaintiff and its contract holders the equal protection of the law; also that said statute absolutely prohibits any individual or group of individuals from engaging in a private business, which, under the terms of said act is admittedly legitimate and lawful, and permits corporations to do the very things which, by its terms, individuals are forbidden to do.

Fourth: That said act, if enforced, constitutes governmental interference which disturbs the normal adjustment, making, and consummation of legal acts, legally entered into, and will derange the business of the plaintiff, its contract owners and other persons, and actually threatens confiscation of their property.

Fifth: That unless plaintiff is permitted to carry out the provisions of its said contracts with its said contract owners, and particularly to continue its business in accepting repayment on contracts already written, and is permitted to enter into contracts to make loans on real estate and to make loans on real estate with monies of contract holders already accumulated, there will be interference, particularly with the options accruing to contract holders under the provisions of Section 6 of the Loan Contract, "Schedule B", annexed to the complaint, which will result in irreparable loss and damage to the plaintiff and its contract owners; that unless plaintiff is permitted to carry out its contracts, the result will be disastrous to plaintiff, depriving it of a reasonable return upon its surplus, reserve fund, expense reserve fund, and trust fund, accumulated for the benefit of its said contract holders, and cause plaintiff to wind up and discontinue the business conducted by it.

Sixth: That the Court erred in denying the plaintiff's prayer for a preliminary injunction until the final decree herein.

Seventh: That the Court erred in denying the application of plaintiff for a modification of the order and decree made herein on June 25, 1923.

Eighth: That the Court erred in denying plaintiff's application for an interlocutory injunction suspending and restraining the enforcement of Chapter 895 of the Laws of 1923 of the State of New York, pending the final decree in this suit, and in refusing to enjoin and restrain, pending such final decree, the defendants from acting under and by virtue of the authority of said alleged statute and from enjoining the defendants from in any way enforcing or attempting to enforce against the plaintiff the provisions of said act.

On the 25th day of June, 1923, at the Federal Building, in the City of Albany, New York, the Constitutional Court, consisting of Honorable Julius M. Mayer, Circuit Judge presiding, Honorable Augustus N. Hand and Honorable Frank Cooper, District Judges, made the following order:

"ORDERED, ADJUDGED AND DECREED, as follows, that the plaintiffs' prayer for a preliminary injunction is denied, except that until the final decree herein, the defendants herein are enjoined from prosecuting this plaintiff, and enforcing the provisions of Chapter 895 Laws 1923, against plaintiff as to contracts actually entered into on or before June 25, 1923. Leave for modification may be applied for on July 6, 1923, at 2 P. M."

On July 9, 1923, upon the hearing for modification of the above order the application for modification was denied.

In short, the Constitutional Court contented itself with enjoining the defendants from prosecuting the plaintiff as to contracts actually entered into on or before June 25, 1923, but the Constitutional Court failed to enjoin the defendants from prosecuting the plaintiff in the writing of new business or contracts.

POINTS

I

This act, as shown by its title and context, is designed to prohibit natural persons, acting either singly or in groups, from competing with private bankers, Savings Banks, Savings and Loan Associations and Corporations in a private business concededly legitimate and lawful in and of itself and hitherto open to all persons without discrimination.

To this end the act purports to make it a crime for an individual, a partnership or an unincorporated association, except individuals engaged in the banking business, pursuant to the existing provisions of the Banking Law;

1. To engage in any way in the business of receiving either deposits or payments of money in instalments of less than \$500.00 each for co-operative, mutual loan, savings or investment purposes;

2. To solicit such deposits with or payments to such individuals or groups of individuals;

3. To solicit the execution of a declaration of trust to or a contract with such individual or group of individuals under which such deposits or payments shall become due and payable;

4. To engage in or conduct a business similar to the business of a savings bank or of a savings and loan association;

5. To promise to make a loan, upon real estate security, for building, home-owning, savings or investment purposes, as an inducement for such payment to such individuals or group of individuals.

This legislation is clearly beyond the power of the state, as limited by the State constitution (Art. 1, Sec 6) and by the constitution of the United States (Fifth and Fourteenth Amendments), because it deprives persons of liberty and property without due process of law and

denies to persons within the jurisdiction of the state the equal protection of the laws in that it absolutely prohibits an individual or a group of individuals from engaging in a private business, which, under the terms of the very act, is admittedly legitimate and lawful and allows corporation to do the very thing which, by its terms, individuals are forbidden to do. It is settled by many decisions of the Court of Appeals of New York that the state cannot prohibit a person from engaging in a business, occupation, or calling which in and of itself is lawful because to do so would be to deprive such person of liberty and property in violation of both the constitution of the state and the constitution of the United States. It is held that the right to liberty includes the right to earn a living in any legitimate business and that this right is a property right within the meaning of both constitutions.

The state may exercise its police power to regulate a lawful business in order to promote the health, comfort, safety or welfare of society, but it cannot *prohibit* a person from engaging in a legitimate business, subject to lawful regulations by the state. The leading cases on this proposition are *Matter of Application of Jacobs*, (98 N. Y. 98) and *People v. Marx* (99 N. Y. 377). In the *Jacobs* case a statute prohibiting the manufacture of cigars and the preparation of tobacco in a tenement house occupied as a residence was held unconstitutional because it arbitrarily deprived a person of liberty and property. In the *Marx* case the Court of Appeals made the same ruling upon the same grounds with respect to a statute which prohibited the manufacture of oleomargarine and the sale thereof as an article of food.

In the *Jacobs* case the court said:

"The constitutional guaranty would be of little worth, if the legislature could, without compensation, destroy property or its value, deprive the

owner of its use, deny him the right to live in his own house or to work at any lawful trade therein. If the legislature has the power under the Constitution to prohibit the prosecution of one lawful trade in a tenement house, then it may prevent the prosecution of all trades therein.

"So, too, one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty which are under constitutional protection.

"Such legislature may invade one class of rights today and another tomorrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and the governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal

adjustments of the social fabric, and usually derange industry and cause a score of ills while attempting the removal of one."

In the Marx case the court, after citing and quoting from the Jacobs case, says;

"Who will have the temerity to say that these constitutional principles are not violated by an enactment which *absolutely prohibits* an important branch of industry *for the sole reason that it competes with another*, and may reduce the price of an article of food for the human race.

"Measures of this kind are dangerous even to their promoters. If the argument of the respondent in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleo-margarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would arguments then be found wanting to demonstrate the invalidity under the constitution of such an act? The principle is the same in both cases. The number engaged upon both sides of the controversy cannot influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them."

The principles upon which both of these cases rest were applied and the statutes prohibiting persons from engaging in legitimate occupations were declared unconstitutional by the Court of Appeals of New York in the following cases:

People vs Gillson (109 N. Y. 389), holding unconstitutional a statute which prohibited the sale of any article of food upon a representation or inducement

that something else will be delivered with the purchased article as a gift, premium or reward.

People ex. rel. Tyroler vs Warden (157 N. Y. 116) holding unconstitutional a statute which prohibited the selling of tickets for passage on vessels or railroad trains by any person except common carriers and their agents.

Schnaier vs Navarre Hotel, et. Co. (182 N. Y. 83) holding unconstitutional a statute which prohibited a co-partnership in New York City from engaging in the business of an employing or master plumber unless each and every plumber was a registered plumber.

People ex. rel. Moskowitz vs Jenkins (202 N. Y. 53) holding unconstitutional a statute providing that no person shall conduct a transient retail business in a store in any city of the third class, village or town for the sale of goods represented or advertised as a bankrupt or assigned stock or as damaged goods without paying a license fee.

The legislature in enacting the statute now in question did not even purport to be exercising police power in order to promote the health, comfort, safety or welfare of society. On the contrary the act expressly states its purpose to be to prohibit *encroachments by individuals upon certain powers of private bankers, savings banks and savings and loan associations*. Obviously the act is designed to stifle competition with the favored classes of individuals and with corporations.

If the act did purport to be an exercise of police power designed to promote public welfare, it nevertheless would be unconstitutional, under the cases cited, because it is apparent that the act is not in fact intended to promote public welfare. It allows certain individuals and groups of individuals and all corporations to continue to engage in an established business,

thereby certifying that business to be entirely consistent with the public welfare and eliminating any design or purpose other than to protect the favored classes against competition. The actual purpose of the act being to restrain competition, the act is clearly contrary to the general policy of the state as declared in other statutes, which is to promote competition and to prevent the very thing which this act is designed to accomplish. But if the act were in fact designed to promote and actually did promote public welfare, it would be unconstitutional under the cases cited because it *prohibits* a person from engaging in a lawful occupation, whereas the power of the legislature in the premises is limited to regulation.

Moreover, the statute discriminates between natural persons and corporations in the conduct of business and, for this additional reason, violates the 14th Amendment to the Constitution of the United States, which requires the state not to deny to persons within its jurisdiction the equal protection of its laws. In *State v Scougal* (3 South Dakota 55, 51 N. W. 858) the Supreme Court of South Dakota held that a statute which prohibited individuals from engaging in the banking business and allowed only corporations to do so violated the 14th Amendment of the Constitution of the United States and so was void. This case is strong authority against the validity of the act now under consideration not only because it overthrew substantially similar legislation but also because the South Dakota court rested its decision particularly upon two of the New York cases cited above, viz: *Matter of Application of Jacobs* (98 N. Y. 98) and *People vs Marx* (99 N. Y. 377).

In the matter of granting a franchise, a privilege to which a person has no inherent right, the state may grant it only to natural persons, as in the case of the

privilege of being an attorney at law (*Matter of Co-operative Law Co.*, 198 N. Y. 479), or only to corporations, as in the case of the privilege of acquiring property for railroad purposes by eminent domain (*People vs Erie R. R. Co.*, 198 N. Y. 369), or to natural persons and to corporations as in the case of a franchise to own and operate a railroad (*Village of Phoenix vs Gannon*, 195 N. Y. 471; *People vs Erie R. R. Co.*, *supra*, page 376); But to engage in a lawful business is an inherent right and not a privilege. As the Court of Appeals of New York has frequently said, "Banking is a business and not a franchise". (*Curtis vs Leavitt* 15 N. Y. 9 at page 60; *People vs Doty*, 80 N. Y. 225; *Perkins vs Smith*, 116, N. Y. 441, at page 448). Consequently the act now in question deals with a business which any person has the inherent right to conduct, subject to the power of the state to regulate that business for the public good. This being so, it is invalid discrimination to deny this right to individuals while allowing it to corporations. In *State vs Scougal* (*supra*) the court summarized the principle here involved as follows:

"It is contended that citizens may associate themselves together, and become a corporation, under the act, and, as such corporation, transact the business. This is true, but can the citizen be required to abandon a business, not necessarily injurious to the community, which he is carrying on, and be required to invest his capital in a corporation over which he may have no control, except as a mere stockholder, or otherwise be deprived of his right to pursue his lawful calling? Are not privileges and immunities granted by the act to corporations that are denied to individual citizens? It may be contended that there is no discrimination as between corporations; that all corporations organized under the act are granted the same privileges and immunities, and that this satisfies the constitutional provision.

But this is too narrow a construction of this important constitutional provision, intended for the protection of the rights of the citizen. In law, a corporation is a citizen of the state of its creation, and for many purposes a person in law also. When these privileges are conferred upon private corporations, which at common law belong to the citizen, and the same privilege is denied to the individual citizen, this provision of the constitution, in our opinion, is violated."

Under the "Consolidated Laws of New York" by McKinney, vol. 1 Statutes, p 75, par. 20 appears the following: "A pre-existing right or liability, whether or not it is constitutionally protected from change, will not be affected by legislation, unless legislative intent to the contrary is obvious".

Here in the situation at bar, an apparent intent to the contrary is very obvious. It strikes at all rights of contract with reference to real estate loans and saving plans for accumulations of small accounts for that purpose. It has been said: "If the statute is so clear and unambiguous that it can receive no reasonable interpretation except such, as conflicts with constitutional provisions, the courts do not hesitate in their duty of declaring the enactment void."

McKinney vol. 1 Statutes of New York, p 153, end of par. 86.

The Courts of the State of New York have repeatedly held that:

1. The legislature cannot enact a retroactive statute which impairs the obligation of Contract.

Livingston vs Livingston 173 N. Y. 377.

2. Nor one which is an ex post facto law.

Hartung vs People 26 N. Y. 167.

Mongeon vs People 55 N. Y. 613.

3. Nor one which takes vested rights without due process of law.

Walter vs Evergreens 47 N. Y. 216.

People vs O'Brien 111 N. Y. 1.

McKinney vol. 1, Statutes of New York, p 73, par. 18.

Inasmuch as the Superintendent of Banks of the State of New York and the Attorney General have heretofore attempted and may again attempt to argue that these plaintiffs can organize as a corporation it seems proper to tear the mask from any such pretence by pointing out that the Statute here in question reads—last sentence—

“Any *person* who shall violate any provision of this section shall be guilty of a misdemeanor.”

The General Construction Law of the State of New York, (L. 1909, ch 27, par. 37 of New York), provides:

“*The term person includes a corporation and a Joint Stock Association.*”

It was the rule at common law that a corporation might be included in the term “person”.

Mains vs Baltimore R. R. Co. 175 N. Y. 409.

A domestic corporation in New York is in law a person.

Inigley vs Thatcher 207 N. Y. 66.

In short, the Attorney General of the State of New York has already so ruled in holding that a corporation formed for the purpose of conducting a detective business is a “person” within the meaning of the General Business Law requiring a person or corporation to procure a license, engaging in such business.

Op. Atty. Gen. (N. Y.) 1909, 350.

This brief is submitted in behalf of *Mutual Benefit League of North America*, being the trustees of and under a declaration of trust made and filed in June

1921, and the contract holders, called "members", who have entered into a contract with the trustees pursuant to and for the purposes stated in the declaration of trust. This organization has been engaged in one of the businesses which the act purports to prohibit and now has nine thousand (9,000) contracts outstanding in the hands of members. It operates under a plan and contract which have been successfully operated by others for a period of approximately twelve years and which have been approved by a competent actuary as financially sound and capable of fulfillment. (Folios 134 to 140).

Although the act may be designed and intended to prohibit only business of the kind of the Mutual Benefit League of North America, or substantially similar business, it is so loosely drawn that it purports to prohibit and, if valid, would prohibit the conduct of many other kinds of business. For example, it would, if valid, prohibit brokers or other individuals from selling stocks, bonds and other investment securities upon the installment plan unless the installments were \$500 or more because it would prevent any individual from soliciting, agreeing to receive or receiving payments in installments of less than \$500 each for investment purposes; it would prevent bondholders, committees, or other associations of creditors from entering into and carrying out agreements whereby bondholders or other creditors agree to make payments in installments of less than \$500.00 each to acquire the debtors business for protection of the creditors; it would prohibit syndicates and joint adventures of individuals in general where the purpose is to raise money in installments of less than \$500.00 each for investment in any enterprise whatever; and it would prohibit persons engaged in the construction of houses and sale of residence properties from selling such property, as most small residence property is sold, under a contract

whereby the seller receives a cash payment of less than \$500.00 when the deed is delivered and agrees to make or procure a loan to the buyer secured by a mortgage upon the property to be paid off in monthly instalments equivalent in amount to the rent generally charged for similar houses. There are doubtless many other lawful and useful enterprises which would be prohibited by this act if it were a valid law, but these examples suffice to show that the act as drawn goes far beyond the intention of the legislature.

For the reason herein stated, it is respectfully submitted that the act is unconstitutional and undesirable and should not become a law. To allow it to become a law would accomplish nothing other than to compel persons upon whose rights the law enacted purports to infringe to resort to litigation to have the courts formally hold that the law is unconstitutional.

It is submitted that it is only in cases of great emergency engendering over-ruling necessity that property may be taken or destroyed without compensation, and without what is commonly called due process of law. The constitutional guarantee against deprivation of liberty and property without due process of law, contained in both federal and state constitutions are violated by this act.

Boyd vs U. S. 116 U. S. 635.

Lochner vs New York, 198 U. S. 64.

Adair vs U. S. 208 U. S. 161.

Neither is this legislature justified by a resort to the police power,

Lawton vs Steel, 152 U. S. 137.

Holden vs Hardy, 169 U. S. 366.

Lochner vs New York, 198 U. S. 45.

Wright vs Hart, 182 N. Y. 330.

People vs Marcus 185 N. Y. 257.

People vs Williams, 189 N. Y. 131.

The guarantee of the federal constitution in relation to the equal protection of the law is violated by this statute.

In order to sustain legislation under the police power the courts must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety and welfare. If it discloses no such purpose, but is clearly calculated to invade the liberty and property of private citizens, it is plainly the duty of the courts to declare it invalid, for legislative assumption of the right to direct the channel into which the private energies of the citizen may flow, or legislative attempt to abridge or hamper the right of the citizen to pursue, unmolested and without unreasonable regulation, any lawful calling or avocation which he may choose, has always been condemned under our form of government.

II

The Federal Courts have practically taken it for granted that equity has power, to be exercised in proper cases, to restrain prosecutions under unconstitutional State or Federal Statutes and to grant preliminary or interlocutory injunctions, where the constitutionality of a given penal law is doubtful and partly debatable and permanent final injunctions where the laws are held invalid.

And this is particularly true where property rights are threatened with irreparable injury or damage.

Jacob Hoffman Co. vs McElligott, 259 Fed. 525.

Truax vs Raich, 239 U. S. 33.

In Hammer vs Dagenhart (247 U. S., 251), a suit in equity was brought to enjoin the defendant, a United States Attorney, from enforcing an act of Congress intended to prevent interstate commerce in the products

of child labor. The suit was recognized as a proper one and the District Court held the act unconstitutional, which decree was affirmed upon an appeal taken directly to the Supreme Court of the United States, and a permanent injunction against the enforcement of the law was sustained.

In *Wilson vs Mew* (243 U. S. 332), the complainant sued the defendant, the United States Attorney, to restrain him from enforcing as unconstitutional the act of Congress known as the Adamson Law, establishing an eight-hour day for those engaged in interstate commerce, and the Supreme Court of the United States reversed the decree of the United States Circuit Court of Appeals upon the merits, holding that the act was constitutional, taking it for granted, that, if it had come to a contrary conclusion on the merits, a suit in equity with injunctive relief would have been proper.

One of the most recent, if not latest, authority sustaining suits in equity restraining the enforcement of unconstitutional criminal laws is that of *C. A. Weed & Company vs Lockwood*, (250 U. S. 104), in which section 4 of the profiteering law, known as the Lever Act, was held unconstitutional, and a permanent injunction after indictment against its enforcement, was granted against the United States Attorney.

In the *Weed* case, the District Court properly considered the validity of the act, and came to the conclusion that it was constitutional, evidently entertaining no doubt as to the appropriateness of an injunction in case it had held to the contrary. (*C. A. Weed & Co. vs Lockwood*, 266 Fed., 785).

This decision on an appeal from the order refusing an interlocutory injunction was affirmed on the merits as to the constitutionality of the Act by the three

judges of the United States Circuit Court of Appeals, two of whom held that the remedy by injunction would have been available, if they had found the Act constitutional, and one of them holding to the contrary. (*C. A. Weed & Co. v. Lockwood*, 266 Fed., 785).

Thereupon, the District Court rendered a final decree dismissing the bill on the merits, from which an appeal was taken directly to the Supreme Court of the United States, resulting in a reversal and the granting of a final decree awarding a permanent injunction. (*C. A. Weed & Co. vs Lockwood*, 255 U. S., 104, *supra*).

III

The police power of the state is subject to constitutional limitations.

"In a constitutional government limitation is the abident principle, exhibited in its highest form in the constitution as the deliberative judgment of the people which demonstrates every claim of right and controls every use of power."

People vs City Prison 144, N. Y. 529.

In *Hauser vs North British Insurance Company*, 206, N. Y. 455, p 462, the Court says:

"Where the legislature may prohibit a business, or an occupation, it may prescribe conditions upon which it may be conducted; but, if the business, or occupation, be useful to the citizen, and it be lawful, the Constitution, whether of the state or of the nation, guarantees to him the right to pursue it freely and any arbitrary restriction upon its pursuit should be condemned as an invasion of the guaranty. In varying language, but with the same thought, in very many cases, this court has pointed out that the constitutionality of an act is to be tested by its effect upon the citizen's

right freely to pursue lawful occupations; that a statute under the guise of an exercise of the police power cannot arbitrarily interfere with that liberty of pursuit; that the equal protection of the laws means equality of opportunity to all in like circumstances and that classification to be valid must not be arbitrary and discriminate against persons without a basis in reason. These principles have become familiar from frequent statement in the decisions and need no citation, nor discussion, of the cases here. They have become constituent elements in our popular form of government. The very nature of our free government forbids that a man should be compelled to refrain from acts which the laws permit."

An enactment which does not relate to the health, moral safety or welfare of the community, but only to the private interests of an *individual or a particular class of individuals* cannot be sustained as an exercise of the police power.

People vs C. Klinck Packing Company, 214 N. Y. 121, and many other cases cited.

Legislation passed in the exercise of the police power must be reasonable in the sense it must be based on reason as distinguished from being wholly arbitrary or capricious.

People vs Griswold, 213 N. Y. 92.

In Fisher Co. vs Woods a similar penal statute of the State of New York attempting to prohibit any person from acting as a real estate agent without written authority of the owner of the property is attacked. The statute in that case reads as follows:

"In cities of the first and second class, *any person* who shall offer for sale any real property without the written authority of the owner of

such property, or of his attorney in fact, appointed in writing, or of a person who has made a written contract for the purchase of such property with the owner thereof, shall be guilty of a misdemeanor."

In declaring this statute unconstitutional, Judge Haight wrote as follows:

"The constitutionality of this act depends upon the question whether it was a valid exercise, on the part of the legislature, of the police powers of the state. The rules which should control us in the determination of this question appear to be well established by the authorities. The power must be exercised subject to the provisions of both the Federal and State Constitutions, and the laws passed in the exercise of such power must tend, in a degree that is perceptible and clear, toward the preservation of the public safety or the lives, health and morals of our inhabitants or the welfare of the community. But the legislature cannot arbitrarily infringe upon the liberty or property rights of any person living under the Constitution nor prevent him from adopting and following any lawful profession, trade or industrial pursuit not injurious to the community that he may see fit; nor prevent him from making contracts with reference thereto. To justify the state in interposing its authority in behalf of the public, it must appear that the interest of the public generally, *as distinguished from those of a particular class*, require such interference and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. *The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations.* The legislative determination as to what is a proper exercise of the police power, is subject to the supervision of the court and in determining the validity of an act it is its duty to consider not only what has been done under the law in a particular instance, but

what may be done under and by virtue of its authority. Liberty, in its broad sense, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways; to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation. (Health Department vs Rector, etc., 145 N. Y. 32; People vs Gillson, 109 N. Y. 389; Colon vs Lisk, 153 N. Y. 188; Lawton vs Steele, 152 U. S. 133; People ex rel. Tyroler vs Warden of City Prison, 157 N. Y. 116; Stuart vs Palmer, 74 N. Y. 183; Gilman vs Tucker, 122 N. Y. 190, 200, and authorities in each case cited)."

At the conclusion of the opinion, the Court of Appeals further said:

"If, therefore, the legislature, in the exercise of its police powers, may, by this act, lawfully make it a misdemeanor for a person to render services to an owner in procuring a purchaser without his written authority, it may also provide that a lawyer should be guilty of a misdemeanor for drawing a contract for a client, or for rendering him any service, without having authority therefor in writing. It would also be competent to place like restrictions upon every employee in every trade and occupation. It is difficult to see how there could be any limitation to the power of the legislature in this direction. To our minds this is going too far. It is an arbitrary infringement upon the liberty and rights of all persons who choose to engage in such occupation. Had the act been for the purpose of *regulating the business of brokerage* or a statute of frauds, a *different question would have been presented* but it is neither. It relates, as we have seen, to any and every person, and instead of making the oral contract void, it makes the person employed guilty of a misdemeanor and punishable as a criminal. Undoubtedly, the power of the legislature, to enact what shall amount to a crime, is exceedingly large, but as was said by Peckham, J., in *People vs Gillson* (supra): 'That there is a limit

even to that power under our Constitution we entertain no doubt, and we think that limit has been reached and passed in the act under review. So, we concluded with reference to this act."

In very recent cases decided by the New York Courts, it has been held that the police power cannot be arbitrarily exercised, and where it affects the free enjoyment of property it should be closely scrutinized.

See in re Russell, 158 N. Y. Supp. 162.

People vs Byrne, 163 N. Y. 682.

Similar decisions have been made in the trade stamp cases, in which it was held that a provision of the penal code prohibiting the sale or disposal of any article of food or any offer or attempt to do so upon any representation that anything else would be delivered as a gift, prize or premium or award to the purchaser is not valid as a proper exercise of police power of the State.

People vs Gillson, 109 N. Y. 389.

In similar situation are the cases referring to transient retail dealers in which it was held that such prohibition of business could not be sustained as an exercise of the police power.

People vs Jenkins, 202 N. Y. 93.

Also attempted regulations of display advertising.
People vs Greene, 85 A. D. 400. (N. Y.)

When the Insurance Law of the State of New York was revised, an attempt was made by Section 142, to confine the business of a broker in procuring insurance to those who should make that their principal business, or who should be real estate agents or brokers.

This the Court of Appeals held to be unconstitutional, and an unwarranted attempt at exercise of the police power, saying:

"We may readily concede that, as a measure regulative of a business pursuit, which, from the

extent to which it is carried on, is, presumably, affected with a public interest, the requirement by the legislature of a license would not be an unreasonable exercise of power. That would afford an opportunity for inquiry into antecedents and fitness of character, and be a reasonable enough precaution in the public interest. But the legislature has prescribed in this statute a condition for the issuance of the license, *which is a purely, arbitrary restriction*. There is no good reason, and no public interest can, conceivably, be subserved, in prohibiting persons from conducting the business of an insurance agent, or broker, in connection with any other lawful business, or occupation, in which they may be engaged."

IV

Attention is called to recent decision of the Constitutional Court for the Eastern District of New York in the Dollar Gas Cases.

The statute in above case passed at the same session of the legislature of the State of New York and signed by Governor Smith, was claimed to have been confiscatory, and unconstitutional on all of the grounds set forth in the moving papers herein, and the lower Court so decided in the Eastern District of New York (July 1923).

V

The Statute of the Commonwealth of the State of Pennsylvania amending its banking law as passed in the year of 1921 is cited.

Upon the argument herein reference is made to the statute of the State of Pennsylvania covering companies similar to plaintiff, and which statute is now operating, and which is *regulatory* and makes a *classification* as is requested by the plaintiff herein.

A copy of the Pennsylvania statute as passed, together with a copy of the proposed regulatory statute

introduced in the senate of the State of New York as Bill No. 1 on January 4, 1922 in behalf of plaintiff will be handed up herewith, inasmuch as it is assumed this Court will take judicial notice thereof.

V I

The business of the Plaintiff does not partake of the elements of a lottery.

The three necessary elements of a lottery are: the furnishing of a consideration, the offering of a prize and the distribution of a prize, by chance, rather than entirely upon a basis.

Brooklyn Daily Eagle vs Voorhis, 181, Fed. 579.

17 Ruling Case Law, p. 1222.

Eastman vs Armstrong-Byrd Music Co., 212 Fed. 662.

Equitable Loan & Security Co. vs Waring, 62 L. R. A. 93, at 121 (Ga.)

U. S. vs Purvis 195 Fed. 618, at 620.

It cannot be said that there is any element of chance in awarding loans to certificate holders in the order of the date of their application therefor.

What is a Lottery? Perhaps as good a general definition as can be found is that given by Mr. Bishop in his work on Saturday Crimes, Par. 952, as follows:

“Any Scheme whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine.”

Standard Dictionary defines it as:

“A scheme for distributing prizes by chance or lot, where a valuable consideration is given for the chance of drawing a prize especially where such chances are allotted by sale of tickets.”

Bouvier in his Law Dictionary defines lottery as:

"A scheme by which a result is reached by some action or means taken, in which result man's choice or will has no part, and which human reason, foresight, sagacity or design cannot enable him to know or determine, until the same has been accomplished."

Black in his Law Dictionary said:

"Any scheme for the disposal or distribution of property by chance among persons who have paid or promised or agreed to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share of, or interest in, such property, upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a 'lottery' a 'raffle', a 'gift enterprise' or by whatever name the same may be known."

Anderson's Law Dictionary defines it as:

"Where a pecuniary consideration is paid and it is determined by lot or chance, according to some scheme held out to the public what and how much he who pays the money is to have for it."

In 25 Cyc. p. 1633, it is said:

"A lottery is a species of gaming which may be defined as a scheme from the distribution of prizes by chance among the persons who have paid, or agreed to pay, as valuable consideration for the chance to obtain a price."

This definition was approved in *Burks v Harris*, 91 Ark. 205; 120 S. W. 979; 23 L. R. A. (N. S.) 626.

Chief Justice Perley, in *State vs Clark*, 33 N. H. 329, defined it as follows:

"When a pecuniary consideration is paid and it is determined by chance or lot, according to a

scheme held out to the public, whether he who pays the money is to have anything for it, and if so, how much, that is a lottery."

In *Horner v United States*, 147 U. S. 449; 13 Sup. Ct. Rep. 409, the Century Dictionary definition is approved as follows:

"A scheme for raising money by selling chances to share in a distribution of prizes; more specifically, a scheme for the distribution of prizes by chance among persons purchasing tickets, the correspondingly numbered slips, or lots, representing prizes or blanks, being drawn from a wheel on a day previously announced in connection with the scheme of intended prize. In the law the term "lottery" embraces all schemes for the distribution of prizes by chance, such as policy playing, gift exhibitions, prize concerts, raffles at fairs, etc., and includes various form of gambling.

"A lottery for all practical purposes may be defined as a scheme for the distribution of prizes by lot or chance by which one, on paying money or giving any other things of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine."

State v Lipkin, (N. C.) 84 S. E. 340; L. E. 1915-F, P. 1022.

In the case of *State v Mumford*, 73 Mo. 647 at 650, that court adopted the following definitions:

"The term lottery has not technical meaning in the law, distinct from its popular signification and it is defined by various lexicographers, as follows: "A distribution of prizes and blank by chance—a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or other Articles. Worcester Dict. "A scheme for the distribution of prizes by chance." Bouvier's Dict. "A distribution of prizes by lot or chance." Webster's

Diet. A kind of game of hazard wherein several lots of merchandise are deposited in prizes for the benefit of the fortunate." *Ress' Cyclopedia*. "A sort of gaming contract by which for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks". *American Cyclopedia*."

Does relator's plan of making loans constitute a lottery?

In the making of loans to its certificate holders, its plan is this:

Each certificate holder is entitled to a loan, provided he offers proper security for the repayment of same. If his certificate is for \$500.00, he is entitled to a loan for that amount. If his certificate is for \$1,000.00 he is entitled to a loan for that amount. In other words, he is entitled to a loan for the face amount of his certificate. It is so provided, not only in Relator's Declaration of Trust (pp 46-47). He is entitled to his loan whenever the accumulation in the loan fund equals the amount of the loan desired. The order, however, in which loans are made, very properly depends upon the date of the certificate holder's application therefor. The Declaration of Trust so provides,

The certificate issued to, and held by, the party desiring the loan provides: (Schedule B).

"The prompt payment of the monthly installments . . . shall render the contract owner eligible to receive a loan to the extent of the face value of this contract in the order of his application therefor . . ."

Assuming it is true, as may be claimed by Cross-Appellee "the first application for a certificate in point

of time shall have a priority for loan privileges over applications for certificates subsequently made." But wherein does this constitute a lottery?

It is held by all of the authorities that the three elements necessary to constitute a lottery are: first, prize; second, consideration; and third, chance; and that all of these elements must exist.

In "lottery" there must be union of three elements: consideration, chance and prize.

Russell v Equitable Loan & Security Co., 199 Ga. 154; 58 S. E. 881-884.

"The three necessary elements of a 'Lottery' are the furnishing of a consideration, the offering of a prize, and the distribution of the prize by chance rather than entirely upon a basis of merit."

Brooklyn Daily Eagle v Voorhis, 181 Fed. 579.

"The three essential elements of a lottery are: first, consideration; second, prize; and third, chance. To make a lottery these three elements or ingredients must be present; chance alone will not do so, nor will chance when coupled with consideration alone."

17 Ruling Case Law p. 1222.

To the same effect are Eastman v Armstrong-Byrd Music Co., 212 Fed. 662 (C. G. A.); Equitable Loan & Security Co. vs Waring, 62 L. R. A. 93 at 121 (Ga.):

U. S. vs Purvis 195 Fed. 618 at 620.

"What possible element of chance is there in awarding loans to certificate holders in the order of the date of their application therefor? To

award loans in such manner as is only to apply the everyday rule of "first come, first served."

What is chance?

Standard Dictionary defines it as:

"The unknown or undefined cause of events that to us are uncertain or not subject to calculation; luck; fortune; * * * an event resulting from an assumed fortuitous agency; an accident;"

Century Dictionary, among other definitions, gives this:

"Fortuity; especially the absence of a cause necessitating an event or the absence of any known reason why an event should turn out one way rather than another, spoken of as if it were a real agency."

Worcenter defines it to be an

"Absence of an assignable cause; accident; fortuity; fortune."

In 11 Corpus Juris, page 279, "chance" is defined as follows:

"Possibility; hazard, risk, or the result or issue of uncertain and unknown conditions or forces, neither understandingly brought about by one's act nor pre-estimated by one's understanding;
* * *"

Appellant's loan applications must be granted or disposed of in some order, and in some way. What manner of disposing of them is so free from favoritism as the manner proposed, viz: of granting them "according to the day, hour and minute" they are signed? The making of loans in this manner does not—as

stated by respondent—make it impossible for the applicant for a certificate “to know at the time the application is made what the order or priority will be.” When he knows that he will not be entitled to a loan until loans have been made to all applicants who have made application therefor prior in point of time to his, he also knows that he will receive his loan before a loan is made to anyone whose application is dated subsequent to his. In other words, his relation with every other certificate holder, and those who may become certificate holders—so far as the time when he will receive his loan is concerned—is absolutely fixed the minute he signs his application. Instead of rendering it impossible for the applicant to know, at the time of his application “what the order of priority will be” this manner of granting loans makes it possible for the applicants to know exactly what the order of priority will be—and it is the only manner which does make this possible.

In the case of *Great American Home Savings Institution v Lee*, Supervisor of Building and Loan Associations, 233 S. W. 20—which was a proceeding to compel the issuance of a license to do business—the facts in this regard were exactly as the facts here. In that case, as shown not only by the statement of facts made by Judge Higbee, but by the provisions of the contract or trust certificate issued by the Home Savings Institution, as set out in the abstract of record in that case, the holder of a trust certificate was entitled to a loan “equal to its face value,” and “in order of written application made therefor,” and “subject to the rights or priorities of other certificate owners”. It was urged in that case by the Supervisor of Building and Loan Associations, as a reason why he should not issue a license to the Home and Savings Institution, that the foregoing manner of awarding loans. Viz; in the

order of the application therefor, constituted a lottery. In denying the first contention that court said, p. 29:

"Criticism is made of the plan for making loans; that they must be made in the order of their application. Any other plan would savor of favoritism."

In disposing of the latter contention it was said:

"Finally, it is said that Section 10263, R. S. Permits lotteries in violation of Section 10 of Article 14 of the Constitution. It authorizes the accumulation of a fund or funds for the purpose of enabling the contributors to such funds, or their assigns, to secure loans. A simple reading of the Statute excludes conception of a lottery."

The court will observe, we are sure, that in its proposed plan of making loans relator does not give away, or sell, tickets. It does not give or offer to give anything away. It conducts neither a gift enterprise nor a drawing of any kind. Nothing connected with its plan of making loan suggests, even remotely, any such thing. Its plan of awarding loans to its certificate holders in the order of the date of their application therefor is not a scheme whereby one, on paying money, becomes entitled to receive "such a return in value, or nothing, as some formula of chance may determine." This is not a case where one certificate holder gets a loan and another certificate holder does not. Each certificate holder gets just what he is promised in his certificate, if he desires it and has the necessary security. In no event does any certificate holder get nothing, and in no event does he get any less than he is promised, or any less than any other person holding a certificate for a like amount. Each and every certificate holder receives a loan for the face value, or amount of his certificate.

Neither is relator's plan of making loans a scheme where a pecuniary consideration is paid and it is

then determined "by lot or chance * * * * what and how much he who pays the money is to have for it." That for which the certificate holder pays his money is not determined by lot or chance. One of the things for which he pays his money is for the privilege of obtaining a loan, should he afterwards desire it. If he does care to exercise his own privilege, then he continues to pay on his certificate until he has made all monthly payments, at which time his certificate becomes paid up and he is entitled to receive the amount he has paid thereon, plus his "pro rata share of the net proceeds," but in neither event is his loan, or the amount thereof, or the amount of his paid-up certificate, determined in any way by lot or chance. He is entitled to a loan in the face amount of his certificate any time he desires it, after a sum equal to the amount of the loan desired has accumulated in the loan Fund, and after loans have been made to those certificate holders whose applications were signed in point of time, prior to his.

"Chance," as used in every definition of lottery, is recognized as a subsequent event. That is, it is something which happens to the payment of the consideration or consumation of the contract. in 17 Ruling Case Law, p. 1233, it is said:

"Chance, as one of the essential elements of a lottery, has reference to the attempt to attain certain ends, not by skill or any known or fixed rules, but by the happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity."

To the same effect is *Russell vs Equitable Loan and Security Company*, 129 Ga. 134; 58 S. E. 881.

In the case at bar, what event transpires subsequent to the date of the certificate holder's application to fix the order of priority of his loan? None whatever,

for the order in which his loan is to be granted is fixed and determined the minute he signs his application. No subsequent event changes, or can change, the order in which his loan is to be made, or the amount of his loan, for he has determined that himself.

In the case of Equitable Loan Security Co. vs Waring, 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, the company issued certificates containing an obligation to pay the holder \$500.00 at the end of 14 years in consideration of the payment by him of a membership fee of \$4.00 and a monthly instalment of \$1.25 for the period named. 25% of each monthly instalment went to pay expenses. 50% of each instalment went into a reserve fund.

Certificates were redeemed in the order indicated by a multiple table based on the figure three. The court held that this plan of doing business was not a lottery, and this notwithstanding the fact that the company's certificates were numbered according to the receipt at its office of applications therefor, and were paid in the order indicated by a multiple table. The court said:

"Some plan had to be adopted for ascertaining what number should be called when it was not desired to call all certificates that had a redemption value. Any plan adopted would be purely arbitrary and any plan adopted would have some element of chance in it, using that word in its broad sense."

So it is here. The order in which appellant proposes to determine its applications for loans must be arrived at in some way. It cannot make those loans to every member the same day. It may be, as said by the courts, that any plan adopted would have some element of chance in it, using that word in its broad sense. In the method proposed, however, that is no element of chance, using that word in the sense in which it is used.

as constituting one of the elements of a lottery. Besides, the method proposed is absolutely free from favoritism. As said by Judge Higbee in *State ex rel Great American Home Saving Institution v. Lee*, *Supra*.

"Any other plan would savor of favoritism." The court in the *Waring* case, *supra*, also said:

"Chance alone will not make a lottery. When a number of persons are entitled in any event to a given amount, though it may not be the same amount and all cannot be paid at one time, the determination by lot or chance or drawing of what portion of that number shall be paid at different times would not give the transaction the characteristics of a lottery. It is when the amount to be paid, or the value of the article to be delivered, is, itself, determined, either in whole or in part, by lot, drawing or chance that the elements of a lottery are possible. Corporations issue bonds and reserve the right to call in for redemption a portion of the bonds before they are due. It is not unusual in such cases for the contract to stipulate that the number of bonds to be called shall be determined by lot or chance. Such a transaction as this has never been held to be a lottery, although there was the element of chance in regard to whose bonds should be called. It is not a lottery because there is no element of prize. The value of the bond is not increased or diminished by the drawing. Each bond is paid its value at the time it is called—no more, no less—and the only question determined by lot is, whether the bond of "A" shall be called instead of bond "B" or the bond of one number in preference to the bond of another number."

In appellant's plan of business, neither the amount which the certificate holder pays on his certificate, nor the amount of his loan, nor the amount of the payments which he is required to make in repaying his loan, are in any way determined, either in whole or in

part, by 'lot, drawing or chance.' These things are all determined by his contract. The amount of his monthly payments on his certificates is plainly stated in the face thereof, together with the amount of the monthly payments which he must make in repaying the loan. Neither of these matters is left to 'Lot, drawing or chance,' nor is the 'Value of the article to be delivered' to the certificate holder determined by 'Lot, drawing or chance,' for the order in which he receives his loan is determined, not by any other person, nor by the happening of a 'subsequent event incapable of ascertainment or accomplishment by means of human foresight or ingenuity, as required to make a lottery; nor by the order in which some clerk may remove his application from the mail and number it; but it is determined by himself by the 'day, hour and minute' he signs his application. The happening of no subsequent event in any way can change his status. That remains fixed as of the moment he signs his application.

As stated by the court *supra*, it is a well known fact that corporate bonds are frequently issued in which it is provided that the numbers of the bonds to be redeemed at any specified time shall be determined by lot. That was the situation in *Dickerman v. Northern Trust Co.*, 176 U. S. 181; 20 Supt. Ct., Rep. 311. The bonds in controversy there were redeemable by annual drawings conducted by the Trust Company. There was no suggestion that this constituted a lottery. It was even held that the fact that these bonds were so redeemable did not effect their negotiability. No court has ever held this to be a scheme in the nature of a lottery, because each bond is paid in full, no bondholder receiving more than any other for a bond. This being true, there was no prize. The elements of consideration and chance may exist in such case but no prize; hence, no lottery. So we say here, that even

though the court, by any stretch of imagination or process of reasoning, finds that there is an element of chance in relator's plan of making it's loans, yet there is no prize and without a prize there can be no lottery. Every loan is made in a sum equal to the face of the holder's certificate. The only question to be determined, therefore, is whose loan shall be made first. This is determined by the date of the application. There is no element of chance present in such case, yet if there is, it is no greater than that which exists where the numbers of the bonds that are to be redeemed is determined by lot; and, as said by the court in the Waring case *supra* :

"Such a transaction as this has never been held to be a lottery, although there was the element of chance in regard to whose bonds should be called."

Appellant's plan is not a lottery because there is no prize. If it is suggested that the early applicant gets his loan earlier than the later applicant, and therefore gets something of value which the latter applicant **does not get**, and that this something of value constitutes the prize, then we say that such is not the case. If one thousand persons should make application for loans the same day, and if the applications were numbered and the loans made in the order of their numbers, then if the loan desired by him did not exceed the aggregate payments made by the thousand persons into the loan fund, the applicant holding the earlier number might be said to have an advantage but in its consideration of this matter the court will apply the rule of reason. It is well known that applications will not be made in any such manner, and in as much as no applicant can obtain his loan until the accumulations in the loan fund equal the amount of the loan desired, the earlier applicant will have to wait longer for the accumulation of the fund out of which his loan will be made than will the later applicant, but even if the later applicant is

required to wait longer for his loan than the earlier applicant, the latter has obtained no "prize" thereby, as that term is used as an element of lottery. It might as well be said that if the banks and trust companies of this state were making their loans in the order in which applications therefor are made, they are thereby conducting a lottery, because the earlier applicant obtains his loan before the latter applicant. That such is not the case is too clear for argument.

In the later case of *Russell v. Equitable Loan & Security Co.*, 129 G. 154, 58 S. E. 881, the court in speaking of the same certificate that was involved in the *Waring* case *supra*, said, p. 163;

"If not issued in pursuance of a plan involving chance, the mere right of the company to redeem according to the table of multiples would not introduce the element of uncertainty. The holder of a given certificate designated by a number would know as certainly the order in which it would be paid under the table of multiples as if they were to be redeemed in the numerical order. For example, the holder of certificate No. 9 would know from the express terms of the certificate that, in the event the company should elect to call certificates from redemption, number 9 would be the ninth in order for redemption just as he would have known that number three would have been third in order if the plan of redemption had been in numerical order."

And so it is here. The fact a certificate holder does not get his loan until those whose applications are prior in point of time to his get theirs, does not 'introduce the element of uncertainty.' He knows that he will get his loan when prior applicants have obtained theirs.

Continuing, the court said, p. 164:

"As a reasonable business proposition, the creation of the contingency and likewise its settlement, were in advance and expressly provided for

by contract. Not in any sense were the creator or settlement submitted to the arbitrament of a machine or any other scheme of uncertainty. If the contingency happens which was provided for by contract which advances the order of redemption of a given certificate from a lower to a higher rank, there is nothing else to be done; the advancement goes by force of contract.

"The creation of the contingency upon the happening of which a certificate holder obtains his loan is expressly provided for in his certificate; that is, when prior applicants have obtained their loans he will get his. Whether he gets it sooner or later, the happening of the contingency upon which he will get it is fixed by contract. The question is not submitted to, or determined by, the 'arbitrament of a machine or any other scheme of uncertainty,' but it is definitely and absolutely fixed before hand by express contract provision. Nothing is left to chance or uncertainty, or to the happening of subsequent event, but the order in which the certificate holder is to get his loan is determined beforehand by the date of his application and the provisions of his contract."

In *Washington Class Co. v. Mosbaugh*, 19 Ind. App. 105, it was held:

"Where several persons who had agreed to purchase town lots at a certain fixed value per lot the lots to be afterward laid off and planted by vendor and divided among the several purchasers in such manner as they might agree, by mutual participation therein by vendor, the contract for sale of such lots was not thereby rendered void."

In *Chancy Park Land Co. v. Hart*, 104 Iowa 592, certain lots contracted for by the promoter of a packing house plant were subscribed for under an agreement to take the number set opposite the name of each subscriber if the packing house was secured. The lots were to be set apart in such manner as the subscribers

might decide. The subscribers' names were drawn out of one box and the numbers of the lots to correspond were drawn out of the other box by two of the subscribers agreed upon. None of the lots were worth the price paid. The court in holding such a scheme *not* to be a lottery, said p. 596:

"It thus appears that there must be some plan or scheme on the part of the promoters of the enterprise alleged to be unlawful, for the sale or disposition of property by lot or chance before it can be said to have the character of a lottery. If the sale is without the purpose that the property, or any part of it, shall be obtained by the purchaser through chance and this does not result from the nature of the transaction, then it is not so obtained.

"The sale of the lots to the subscribers in this case was not in pursuance of any design to promote a lottery, or in evasion of the law. Each subscriber contracted—as he had the right to do—for the purchase of one or more of the lots, with the understanding that they should be apportioned as the subscribers themselves might determine. Having agreed to buy before the land was platted—induced by a desire to aid an enterprise of anticipated advantage by the city—they concluded, after much discussion and the proposal of other plans to make the selection by drawing the number of a lot and name from different boxes at the same time. We know of no good reason why these purchasers did not have the right to divide their property or that contracted for, according to their own notions and agreement.

"We have discovered no authority, denying them the right, but, on the contrary, it is recognized in *Commonwealth v. Manderfield*, 9 Phils. 457 (2 Wharton Criminal Law, Section 291;) *Yellow Stone Kit v. State*, *Supra*, Joshua so apportioned the promised land among seven tribes

of the children of Israel. The disciples of Christ chose Matthias to succeed Judas by casting lots.

"Under the laws of New York state, the right of an office is determined where there is a tie vote, by the same method. There was nothing in the transaction opposed to good morals, and it was not a lottery within the meaning of the law. Without a scheme or plan to distribute by chance on the part of the promoters, the vital part of a lottery was lacking."

The fund out of which appellant makes its loans is made up of accumulation of contributions made by applicants for its certificates, under the terms of which certificates these applicants are entitled to their loans. Is there any reason why these applicants cannot agree that these loans shall be made in the order of the 'day, hour and minute' of their application therefor? They so agree when they sign their applications and accept their certificates. This is all done before the loan is made. The fund belongs to them—at least the beneficial interest thereto is in them. Shall they not be permitted to distribute it between themselves in the form of loans in any manner which they may determine? Have they not the right to distribute this fund—their property—among themselves according to their 'own notions and agreements'. This was the holding in the Chancy Land case, *supra*, and no criticism thereof is found in all the books. The law has not reached that stage of guardianship of sumptuary kind which would deny them the right to make with and between themselves such a contract.

It is not every conceivable chance that makes a transaction illegal or transforms it into a lottery, or a scheme in the nature of a lottery.

It must be kept in mind that while chance is one of the necessary elements of a lottery, yet not every conceivable chance will transform a plan of business into a

lottery or a scheme in the nature of a lottery. Strictly speaking, there is no such thing as chance for, according to the philosophers everything in the universe moves and acts according to some law. From the standpoint of humanity, however, many things in the life of an individual results from chance. It does not follow, though, that the chance from which a given result happens taints or renders illegal the transaction out of which it arose. If it does, then there are but few transaction which are free from taint or illegality.

In *Eastman v. Armstrong-Byrd Music Company*, 212 Fed. 562 (8th Circuit) at 667 it is said:

“It thus appears that it is not every conceivable chance which makes a transaction illegal, and that the word ‘chance’ as used in the statute, must be construed in connection with the word ‘lot’ and with the words, ‘lottery’ gift, enterprise, or similar scheme.”

The Court commented upon the fact that in *McDonald v. Pacific Debenture Co.* 146, Calif. 67, 80 Pac. 1090, where the company promised to pay certain debentures, not according to choice, but by skipping about according to a fixed table containing a set of numbers called numerals and another called multiples thus, numbers 1, 4, 8, 16, 24, 32, 40, and 48; then numbers 2, 56, 54, 72, 80, 88, 96; then numbers 3, 12, 104, 112, 120, 128, 136, and 144, etc.—it was held that the plan had in it no such chance as to make it a lottery or a scheme in the nature of a lottery.

In *Lauder v. Feoria Agricultural & Tracting Society*, 71, Ill. App. 475, it was held that where the lots in a subdivision were of equal value, one who

brought a lot not described but the exact lot was to be determined by a citizen's committee on fair grounds, the purchaser was bound by the contract.

In *People v. Falls*, 152 N. Y. 12, 46, N. E. 296, 37 L. R. A. 227, it was held that where parties paid an entrance fee for their horses in a race and the association from its own funds offered a prize, this was not a lottery.

The books abound with cases wherein there was an element of chance yet there was no holding of lottery.

In determining the question, if it is considered, as to whether or not there is the element of chance in relator's plan of making loans, the court should, and of course will, construe that term in connection with the term 'lottery, gift, enterprise, ticket or tickets,' as used in section 10, Amendment 14 of our constitution. When so construed and used in the sense in which it must be used when referred to as an essential element of a lottery or a scheme in the nature of a lottery, it will be found wholly absent in relator's plan of making loans.

This case differs from that line of cases relied upon by those interests which are so diligently seeking the annihilation of all home loan institutions, illustrative of which are the following:

McDonald v. U. S. 63, Fed. 426.

U. S. v. Fullerson, 74 Fed. 619.

U. S. v. Purvis, 195 Fed. 618.

Fitzsimmons v. U. S., 136 Fed. 477.

State exrel v. Nebraska Home Co. 66 Nebr. 349; 60 L. R. A. 448; 12 N. W. 763.

Horner v. U. S., 147 U. S. 449; 13 Sup. ct. Rep. 4109.

Siver v. Guaranty Investment, 183, Mo. 41.

Inasmuch as the interests which are opposing all home loan associations have cited the foregoing cases in their printed pamphlets scattered broadcast in the states where these associations are doing business and inasmuch as the language of respondent's return herein indicates it, we think we can safely anticipate that the foregoing cases will be cited and relied upon by respondent herein and therefore proceed to call attention to the theory upon which these cases were decided, as distinguished from the case at bar.

In *McDonald v. U. S.*, 63 Fed. 426, defendant was indicted for sending through the mails a circular setting forth the plan of business of the Guaranty Investment Company of Nevada, Me., on the ground that the plan of business as set forth in the circular was a lottery. In that case the investment company issued an investment bond on the following conditions:

"At the time application is made for a bond, the purchase price of \$10 is paid to the agent taking the application and a monthly installment of \$1.25 is payable on the first of the month following the date of said application; if the installment is not so paid when due a fine of \$1.00 is levied against the holder of such bond, unless the same is paid within fifteen days, and if not paid in the next fifteen days, then the said bond will be cancelled on the books of the company for non-payments. The company pledges the bond-holder that out of the monthly installment of \$1.25 paid, that 25c only shall be used for the payment of bonds in the order of their issue as follows:—

As soon as there is \$1,000 paid into said trust fund, it shall be paid to the person holding bond entitled thereto by the table issued by the company, (providing said bond has not been cancelled for non-payment) as follows—Bond No. 1 will be entitled to the first \$1,000 paid into the

trust fund and bond No. 5 to the second \$1,000; bond No. 2 to the third \$1,000; bond No. 10 to the fourth \$1,000, etc. etc."

The court said that this plan of doing business constituted a lottery and said, pp. 430-431;

" * * * * It is insisted that the element of chance is wanting in the scheme, but its presence is manifest. It is not present primarily in the uncertainty of the time when a bond will be paid, because some bonds have been issued, the order of payment is governed by a fixed rule and the time of payment is uncertain only so far as it depends upon the amount of business done by the company, and the number of lapses of bonds of earlier issue. The element of chance which condemns the scheme is incident to the numbering of the bonds before issue and not directly to their payment afterwards. By the table, which determines the order of payment, bond numbered one is payable first, No. five next, No. two next and so on, alternating between numerals so called and multiples of five, except, it will be observed, that between every fourth and fifth of the multiples no numeral intervenes. There are four numerals to every multiple and it follows that a bond (which might as well be called a ticket) bearing a high multiple number will be entitled to payment sooner than three-fourths of the bonds bearing lower numbers among the numerals and the further the process is carried the greater becomes the disparity between the multiple and the numeral numbers next to be paid, and correspondingly the bonds numbered with numerals except as benefited by lapses, become less and less valuable, because the day of possible payment becomes more and more remote. Now whether or not a purchaser will obtain a bond of one number or another depends, as the evidence very clearly shows, upon the order in which his application shall reach the hand of the Secretary, and that is largely a matter of chance. The Secretary receives applications by mail and otherwise, sometimes singly and sometimes a number

together, and in the order of receipt, and as he chances to take up one or another first, passes them through a registering device and in accordance with the notations thereby made upon the applications the bonds are numbered and issued. But for the purchasers, hope or, as it may as well be said, for his chance, of getting a multiple number, the business would soon cease."

It will be observed that in the McDonald case the bonds were matured arbitrarily according to the numbers, first, 1 then 5, then 2, then 10, etc., and that these bonds were numbered in the order in which the applications therefor were received at the company's office and, as stated by the court, whether or not a purchaser would receive a bond of one number or the other would depend upon the order in which his application shall reach the hands of the secretary.

The Court said:

"That is largely a matter of chance"—

This would undoubtedly be true, especially if the secretary would receive two or more applications at exactly the same time. In such case, as to whose application would be first numbered would be a matter of chance.

In the case at bar, however, there is no such chance, for relator does not propose to make its loans in the order in which applications therefor reach its home office, or the hands of its secretary, but it proposes to make these loans according to the 'day, hour and minute,' applications therefor are signed. In such case, it matters not when the applications reach the hands of the secretary or how many reach him at the same time. The order in which the loans must be made is fixed, not by the secretary or the clerk who happens to receive them but the 'day, hour and minute' of the

signature of the applicant therefor. There is no chance about it. It is a matter about which the secretary or clerk has nothing whatever to do. He does not determine in any way, or by anything which he does, the order in which loans are made, for that is determined by the date of the application therefor.

In the McDonald case, as to whether or not the purchaser received a bond of one number or another depended upon the time at which his application reached the secretary, and if the secretary received two or more applications at the same time, upon which he opened first. As to whether the purchaser received a bond of one number or another, therefor, depended upon the happening of a "subsequent event incapable of ascertainment or accomplishment by means of human foresight or ingenuity," as stated in 17 R. C. L. and other authorities herein cited. This being a matter of chance, it constituted the company business a lottery. That situation, however, does not exist here. The order in which a certificate holder is to receive a loan does not depend upon the happening of any event subsequent to the time of making application therefor. On the contrary, such order of priority is determined by the "day, hour and minute" the application is signed. The element of chance in the McDonald case **was not** in the payment of the bonds after their issue, but was in the manner in which they were numbered. The court so states, p. 430:

"The element of chance which condemns the scheme is incident to the numbering of the bonds before issue and not directly to their payment afterwards."

Because the order in which applicant's loans are proposed to be made does not in any way depend upon the time of the receipt at the home office of applications therefor or upon the time such applications are

opened or numbered by the officer receiving them, as in the McDonald case, but positively upon the "day, hour and minute" such applications are signed—thus eliminating the element of chance—it is manifest that there is no resemblance between that case and the case at bar.

In *Siver v. Guaranty Investment Co.*, 183 Mo. 41 the same scheme that was involved in the McDonald case, *supra*, was considered by that court and, for the same reasons given by the court in the McDonald case, was held to be a lottery. In distinguishing the *Siver* case from *State ex rel Great American Home Savings Institutions v. Lee*, *supra*—in which latter case the facts were exactly as the facts here—this court said:

"The difference between that case and the case at bar is the distance between the poles."

There is exactly the same difference between the facts in this case and the *Siver* case as there was between the *Siver* case and the *Great American Home* case.

The case of *U. S. v. Fullerson*, 74 Fed. 619, was also a prosecution for sending through the mails a pamphlet alleged to concern a lottery conducted by United Indemnity Company. The Court found that the company's plan of business constituted a lottery. That, however, was another case where the company in consideration of the payment of monthly installments, issued bonds to which were attached coupons.

"It was provided that one-half of the amounts received from monthly dues should be placed in a so-called 'Maturity Fund' and that whenever there should be sufficient money in said fund to pay one or more coupons, such number of coupons should be paid and that the coupons to be paid should be determined by taking, first, the coupon numbered 1, then that numbered 5, and so on, in

a geometrical progression, with the ratio 3, until the series reached the highest numbered coupon sold; then taking that numbered 2, then 10 etc., in a second series, with the ratio 5, and so on, until the numbers of all coupons sold should be included in some series."

The vicious nature of such a scheme of course, was apparent and it was as much on this ground that the court held the plan of business to be illegal as it was the element of chance also found to exist.

The court said, p. 628:

" * * * The scheme provides that one-half of the total receipts of the company, outside of the membership fee of five dollars shall constitute what is called a 'maturity fund', which fund, as fast as accumulated, is redistributed among the subscribers, according to a plan characterized by as much uncertainty and chance as it is possible to impart to any scheme. It should be remembered in this connection, that the 'maturity fund' is not put at interest or in any way invested, but simply paid back as fast as accumulated, to certain of the subscribers. This fact, itself argues the existence of that gambling element which the law condemns; for no man, however, unless he absolutely relied upon the ignorance and credulity of his intended dupes, would ever devise or promote a scheme whereby persons are invited to raise, by voluntary contributions, a fund solely for the purpose of redistribution among themselves, unless to each there was offered a chance of getting back something more than he contributed."

In that case there was also the same element of chance that was found to exist in the McDonald case, *supra*, in that the numbers placed upon the coupons which any applicant received depended upon the order in which his application was received by the company at its office. Regarding this the court said, p. 628:

" * * * * The element of chance, however, is specifically and clearly discernible in the facts

that the numbers of the coupons which any particular applicant received depends upon the order in which his application goes in to the company, and that the determination of what coupons shall be paid is made to depend upon the device of numbers whose operations are such that it is utterly impossible for anyone to know the result until the same has been accomplished."

It is clear however, as demonstrated by what we have said regarding the McDonald case, that relator's plan of making loans contains none of the elements of chance contained in the Fullerson case.

The case of *U. S. v. Purvis*, 195 Fed. 615, was a case as in the McDonald and Fulkerson cases, *supra*, where loan applications were determined in the order in which they were received by the company at its office and when two or more applications were received at the same time they were determined and numbered in the order in which they were opened. For other reasons, and because of this element chance, especially the chance, resulting from the fact that when two or more applications were received at the same time they were numbered in the order in which the clerk opened them—an element entirely absent in the case at bar—the company's plan of business was held to be a lottery, the court saying, p. 620:

"The opportunity to obtain a loan, which seems to have been the main feature of this scheme, was determined to a large extent by the way in which the applications for loans were received at the office of the company: that is to say, if a number of applications for loans were received at the same time, by the same mail they were put on the records of the company as they were opened and numbered, and it was of course a mere matter of chance as to which the officer or clerk engaged in this work, should take up first, as he opened and

entered them. It is generally held by the courts that this is chance, such chance as is necessary to constitute that element of lottery."

In *Fitzsimmons v. U. S.* 156 Fed. 477, the facts disclose that the Cumulative Credit Company, in consideration of the payment to it of \$1.00 per week for a certain number of weeks, issued certificates in which it agreed to pay the holder thereof, at a certain time, a sum aggregating \$2.00 a week for the number of weeks the holder had made his payments of \$1.00 each. These certificates were numbered in the order in which applications therefor were received at its office, and were matured in the order of their number. There being found to exist the same element of chance present in the McDonald, Fulkerson and Purvis cases, *supra*, the court condemned the plan of business as constitutional lottery, saying p. 479:

"It is plainly to be seen that in the scheme under consideration it may happen that several new members may send in their first subscriptions on the same day, and that he whose subscription is, by chance, first numbered may obtain a great advantage over him whose number is last. That advantage is undoubtedly in the nature of a prize."

That case differs from the case at bar for two reasons; first no such prize can be found in relator's plan of making its loans; second, its applications for loans are determined in the order of the day, hour and minute they are signed, with no regard whatever to the time they are received by the company at its office.

In the case of *state ex rel v. Nebraska Home Company*, 66 Nebra. 540, 60 L. R. A. 448, 92, M. W. 763, the company in consideration of certain monthly payments, issued a contract promising under the conditions thereof, to return to the holder \$50.00 per month

for 20 months. These contracts were dated and issued 'in regular numerical order as applications are received at the home office,' and matured in the order of their numbers. The court found the scheme to be a lottery because the plan of numbering contracts was attended by the element of chance, saying:

"The applicant must take his chances as to how many applications may be received at the same time that his is received and, if there are several at the same time, he must take the chance of preference over other applications received with his."

Another important factor in that case and which apparently was the real motive which prompted the court to find the contract illegal, was that the company's plan involved 'taking money from its patrons upon the contracts, which, on its part' it was 'impossible to perform and could not 'all be fulfilled'. The court took judicial notice of the fact that the allotted life of a man is 70 years and commented upon the fact that the time of maturity of some of the company's contracts was in excess of that period, and said that:

"The company could not procure a home for number 1,000 in this world and did not profess to be able to render assistance in any other."

The foregoing cases will be found illustrative of the class of cases which may be cited in support of appellee's contention that appellant's plan of making loans constitutes a lottery. We find no fault with the view therein expressed, though there are many authorities of equal respectability holding just the contrary. From the facts in these cases the element of chance, as well as favoritism, may have been manifest, especially if applicants were mailing applications from different states on the same day. If these applications were opened and numbered in the order as opened it

would result in an application mailed from nearby point or delivered in person, receiving a more favorable number than an application mailed from a far distant point, though the latter application was made and signed at a date prior to the date of the former. In such case as to whether an applicant would be given one number or another would depend wholly upon the happening of a 'subsequent event incapable of ascertainment or accomplishment by means of human foresight or ingenuity', viz., the date of its arrival at the company office and the order in which the clerk who opened the mail chanced to number it. Appellant's plan of making loans, however, viz: in the order of the day, hour and minute, applications therefor are signed, has no such element of chance or favoritism.

Another case which will probably be cited is *Horner v. U. S.* 147, U. S. 449, Sup. Ct. Rep. 409, known as the 'Austrian Bond Case'. In that case Horner was indicted for mailing a circular regarding the sale of bonds of the Empire of Austria aggregating 40,000,000 florins. As is well known, these bonds were not payable on any day certain, but the date of payment was fixed by drawings whereby it was determined which series was to be redeemed and the amount to be paid for each bond. For the first 10 years, there were to be five drawings a year, for the next 10 years there were to be four drawings a year and so on and including 55th year. Under this plan the smallest amount to be paid for any bond thus selected for redemption during the first 10 years was 135 gulden: during the second year 140 gulden: and during the third year 146 gulden, and so on increasing 5 gulden each year, until the amount reached 200 gulden which amount then remained stationary until all bonds were redeemed, in addition to this there were certain bonds to be redeemed each year from which large sums were to be given ranging from

250,000 gulden to 400,000 gulden and these bonds were also to be determined by chance drawings.

The court, in holding this scheme to be a lottery, said:

"The mere reading of one of these bonds and drawing plan annexed to it, which is put in evidence, shows that it was the intention to stimulate the sale of bonds by these large prizes which were to be determined at every drawing and which every holder of a bond had the chance of obtaining; and hence it seems to me that the purpose of the scheme was not only to determine by lot when the bonds should be paid, but also to determine certain extraordinary chances to the holders of the fortunate numbers drawn. The mere fact that these bonds were authorized by law of a foreign country, and sanctioned by the policy of such country does not, as it seems to me, in the least degree affect the question in this case."

It may be interesting to note here that in *Hohn v. Koehler*, 96, N. Y. 36, it was held that these same Austrian bonds and the plan of their sale and redemption, did not constitute a lottery. In *ex parte Shobart*, 70 Calif. 632, bonds of the city of Brussels having the same plan of sale and redemption were declared not to be a lottery. In *U. S. v. Zeisler*, 30 Fed. 499, at 500, it was said with reference to bonds of the City of Vienna, likewise with the same plan of sale and redemption (*Italics ours*):

"If these drawings determined only the time when these bonds would be paid, I should say that the mere determining of that time by lot or drawing should not give them the characteristics of a lottery, but when a city or a government, in order to make an inducement for people to buy their bonds, *holds out large prizes to be drawn by chance*, or determined by lot in the manner in which prizes are usually determined in even an honestly conducted lottery, it seems to me it comes

clearly and distinctly within the inhibiting clause of the statute under which this indictment is found."

However, whether the manner of their sale and redemption did, or did not, constitute a lottery, the facts in those cases have not application in the case at bar, for relator conducts no drawings, nor does it offer any prizes in any form. All holder of certificates of the same denomination are entitled to a loan for the same amount. No certificate holder possesses any advantage over another one. They all pay the same amount per month for certificates of like denominations and the same amount per month in liquidation of their loans.

The law will not presume a contract to be illegal or against public policy when it is capable of construction which will make it lawful and valid. If Appellant's plan of making loans is of doubtful meaning, then the court should uphold it, and not impute to Appellant's an intention to disobey the law.

The court ought not to condemn relator's plan of making loans as constituting a lottery or a scheme in the nature of a lottery, unless it appears beyond doubt to be such. If the plan is ambiguous, or if there is any doubt about it, that doubt should be in relator's favor.

In *Equitable Loan & Security Co. v. Waring*, 117, Ga. 93, the court said in speaking of the plan of business there under observation:

" * * * It is familiar law that if a contract is of doubtful meaning and one construction would make it legal, and another illegal, the courts are bound to adopt that construction which will not impute to the parties and intention to disobey the law. It is not to be presumed that people intend to violate the law, and the language

of their undertaking must be always construed, if possible in such a way as to make the obligation one which the law would recognize as valid."

In *Hobbs v. McLean*, 117 U. S. 567, it is said:

"But if the articles of partnership were fairly open to two constructions, the presumption is that they were made in subordination to and not in violation of Section 3737, and if they can be construed consistently with the prohibitions of the section they should be so construed; for it is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be lawful and other unlawful, the former must be adopted."

Under any view of this case, appellant's plan of making loans is wholly devoid of the essential elements of a lottery, viz: prize and chance; without both of these coupled with consideration, there can be no lottery. If the court is in doubt about it, then relator should be given the benefit of that doubt. If the plan is susceptible of two constructions, by one of which it would be lawful and the other unlawful, then the court should hold it to be lawful. Certainly there is no intention on the part of those individuals composing relator to violate the law and in the absence of any such intention clearly appearing, they are entitled to the presumption that they do not intend to do so.

Courts will not declare contracts void because against public policy except when the same is free from doubt and where an injury to the public interest clearly appears.

To declare a contract void as contrary to public policy is a dangerous and delicate task. The policy of this state has always been to permit the greatest freedom in the exercise of the right of contract and before that right should be curtailed or taken away it should be made manifest beyond all doubt that the contract

under consideration is clearly violative of the public policy of the state as established by the constitution, the statutes and decisions of the courts, and, unless the right is denied, that the interests of the public will suffer.

In 13 Corpus Juris, 427, the rule is thus announced :

“ * * * It is clearly to the interest of the public that persons should not be unnecessarily restricted in their freedom to make their own contracts, and therefore agreements are not to be held void as being contrary to public policy, unless they are clearly contrary to what legislature or judicial decision has declared to be the public policy or they manifestly tend to injure the public in any way.”

In *Zeigler v. Ill. Trust & Savings Bank*, 245 Ill. 180, 91 N. R. 1041, 28 L. R. A. (N. S. 1112), the court said :

“The laws and the public policy of the state permit and require the utmost freedom of contracting between competent parties and it is only when a contract expressly contravenes the law or the known policy of the state that the courts will hold it void.”

In *Oregon R. & Nev. Co. v. Dumas*, 181, Fed. 781, (C. C. A.) the Court said, p. 786 :

“A court should declare a contract void as against public policy only when the case is clear and free from doubt and the injury to the public is substantial and not theoretical or problematical.”

It does not appear from the form of contract schedule B that it contravenes any law or the public policy of any state. On the contrary, the form of said contract is clear and explicit in its terms. The conditions

and promises are fairly set out therein. There are no latent interpretations, or meanings regarding the method of making loans to defraud the parties thereto. There are no subtle conditions regarding the order in which the loans are to be made to mislead any man of common intelligence and understanding. The purpose of the contract is not only lawful, but, being in aid of home ownership, it is such as every court should encourage.

VII

Other states than New York have passed statutes regulating and classifying the business of Companies similar to that of Plaintiff.

The moving papers disclose that attempts were made by this plaintiff to get the Banking Department of the State of New York to pass an act in relation to the regulation, licensing and supervision of corporations and individuals, partnerships, unincorporated associations and organizations engaged in the business of *receiving payments, installments or contributions to be held or used, in any plan of accumulation or investment or of issuing, negotiating, offering for sale, or selling any contract on the partial payment or installment plan, or, of assuming fixed obligations, or issuing in connection therewith a contract based upon payments being made in installments or single payment, under which all or part of the total amount received is to be repaid at some future time, either with or without profit, until such corporation or person has complied with the provisions of this article*, and until the superintendent has issued a license or certificate authorizing such corporation or person to engage or continue in such business.

Such proposed bill is handed up herewith, being Bill No. 1, Introduction No. 1, in the Senate of the State of New York, January 4, 1922.

Attention is again called to this point merely to indicate that the Banking Department of the State of New York has been contrary and obstinate with reference to considering the subject of regulation and classification.

Reference is also made to a statute of the State of Pennsylvania passed by the legislature of that state, April 20, 1921, Laws of the State of Pennsylvania, which regulates and classifies the business of such companies as the plaintiff in this action. It is assumed that the Court will take judicial notice of this statute of the State of Pennsylvania now in operation as a reasonable statute on the subject, handed up herewith. plaintiff finds itself, are regulated, handed up herewith.

Attention is further called to a statute of the State of California in which companies of a class in which plaintiff finds itself, are regulated by Chapter of the Laws of the State of Pennsylvania.

VIII

It is finally submitted that an injunction substantially in the form of the temporary restraining order herein should be made by this Court.

Respectfully submitted,

OLIVER D. BURDEN,

Solicitor for Plaintiff,

Office and P. O. Address,
914-918 University Bldg.,
Syracuse, New York.

Office Supreme Court, U.

FILED

MAR 10 1924

WM. R. STANSBIL

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1923

No. 690.

JAMES B. DILLINGHAM, as President, SYLVANUS B. NYE, as Vice-President, FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them, as Trustees of THE MUTUAL BENEFIT LEAGUE OF NORTH AMERICA, operating under An Agreement and Declaration of Trust,
PLAINTIFFS-APPELLANTS,

AGAINST

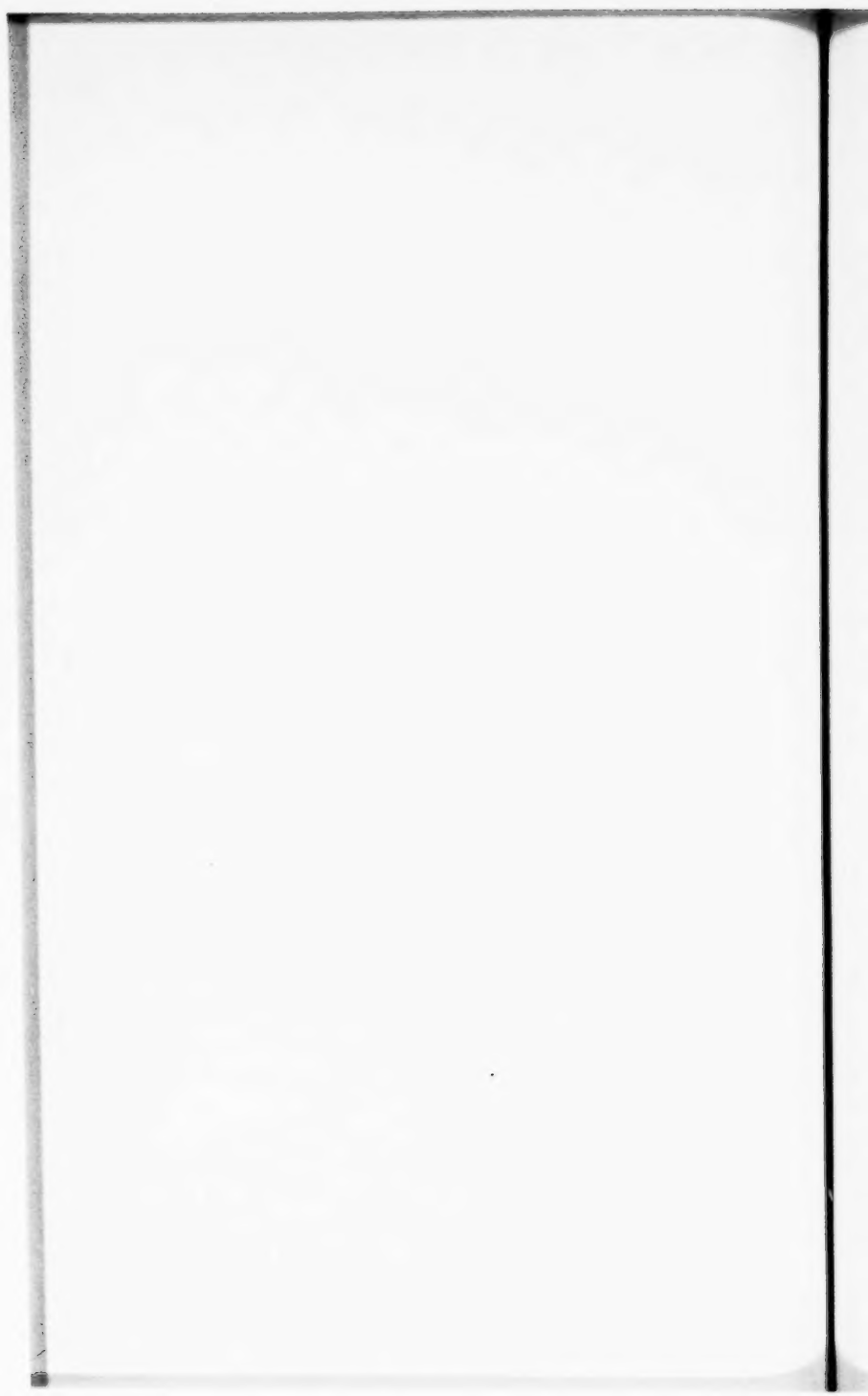
GEORGE V. McLAUGHLIN, as Superintendent of Banks of the State of New York, CARL SHERMAN, as Attorney General of the State of New York, *et al.*,

DEFENDANTS-APPELLANTS.

BRIEF FOR THE DEFENDANTS-
APPELLANTS.

CARL SHERMAN,
*Attorney General of New York and
Solicitor for the Defendants,*
The Capitol, Albany, N. Y.

EDWARD G. GRIFFIN,
*Deputy Attorney General,
of Counsel.*



SUBJECT INDEX.

	Page
Statement	1
Specifications of Errors	2
Organization of Plaintiff's business	4
Restrictions on the banking business in New York	6
The Pleadings	14
The Plaintiff's Contracts	15

BRIEF OF ARGUMENT.

I.

The State may deny natural persons the right to engage in this banking business and may limit the kind of banking business that may be done by the corporations franchised . .	19
---	----

II.

The plaintiffs' business is that of banking, as the conception of that business has been developed	25
--	----

III.

The statute constitutes reasonable regulation under the police power	27
---	----

II.

Page

IV.

As a matter of fact, the business of the plaintiffs partakes of the elements of gambling and of a lottery, and depends upon the folly of the ignorant, inexperienced and credulous 31

V.

The District Court erred in enjoining the defendants from prosecuting the plaintiff and enforcing the statute against the plaintiff as to contracts actually entered into on or before June 25, 1923 41

VI.

The court, if it should reject our preceding points should deny an interlocutory injunction until there is a trial of the issues and the defense has made its case 50

CONCLUSION.

The decree of the District Court should be affirmed with costs insomuch as the plaintiffs' prayer for an interlocutory injunction is denied, but should be reversed with costs insomuch as until the final decree herein the defendants are enjoined from prosecuting the plaintiffs and enforcing the provisions of chapter 895, Laws of 1923 against plaintiffs as to contracts actually entered into on or before June 25, 1923. . . 51

III.

	Page
LIST OF CASES.	
Adair v. U. S., 208 U. S. 161	45
Andrews v. Andrews, 188 U. S. 14	44
Bank for Savings v. Collector, 3 Wall 495 ...	28
Booth v. Illinois, 84 U. S. 425	31
Brass v. Stoesser, 153 U. S. 391	28
Budd v. New York, 143 U. S. 517	28
Cincinnati v. Louisville, etc. R. R., 223 U. S. 390	46
Coppage v. Kansas, 236 U. S. 1	45
Chicago v. Great Western R. R., 233 N. Y. 661	47
Crocker v. Malley, 249 U. S. 223	5
Curtis v. Leavit, 15 N. Y. 9	20
Davidson v. Lanier, 4 Wall. 447	20
Davis v. Caldwell, 2 Rob. (La.) 271	44
Engel v. O'Malley, 219 U. S. 128 .. 3, 10, 21, 31, 40	40
Equitable etc. Co. v. Waring, 117 Ga. 599	39
Fidelity Funding Co. v. Vaughn, 180 Ky. 13 ..	39
Fisher v. State, 140 Ohio Ap. R. 355	38
Fitzsimmons v. United States, 156 Fed. 477 ..	36
Fletcher v. Peck, 6 Cr. 87	46
Gregory v. Trustees of Shelby College, 59 Ky. 589	44
German Alliance Insurance Co. v. Kansas, ..	27
Guthrie v. Harkness, 199 U. S. 148	27
Hoke v. U. S., 232 U. S. 563	44
Horner v. United States, 147 U. S. 449	36
Hepburn v. Griswold, 8 Wall 603	46
In re Mandel, 224 Fed. 642	10, 40
Loan Assoc. v. Topeka, 20 Wall 655	46

IV.

	Page
Louisville v. Nashville R. R. v. Mottley, 219	
U. S. 467	44
Long Island etc. Co. v. Brooklyn, 166 U. S. 685	46
MacDonald v. United States, 63 Fed. 424	35
McLaughlin v. National Mutual, etc. Co., 64	
Fed. 908	36
McLean v. Arkansas, 211 U. S. 539	31
Marymont v. Nevada State Banking Board,	
33 Nev. 333	20
Manigault v. Springs, 199 U. S. 473	47
Mercantile Bank v. New York, 121 U. S. 138 ..	25
Mississippi Society etc. v. Musgrave, 44 Miss.	
820	44
Munn v. Illinois, 143 U. S. 517	28
New York v. United States, 257 U. S. 591.....	44
New York Tenement House Dept. v. Moes-	
chen, 203 U. S. 583	28
Noble State Bank v. Haskell, 219 U. S. 104, 20, 28	
Omnia Co. v. United States, 261 U. S. 502	46
Packard v. Banton decided Feb. 18th	28
Paul v. Virginia, 8 Wall 168	27
People v. McPhee, 139 Mich. 687	36
People v. Utica Ins. Co., 15 Johns 358	19
People v. Beakes Dairy Co., 222 N. Y. 416	24
State <i>ex rel.</i> Hathorn v. U. S. Exp. Co., 95	
Minn. 442	38
State <i>ex rel.</i> Sheets v. Interstate etc. Co., 64	
Ohio St. Rep. 283	38
State <i>ex rel.</i> Prout v. Nebraska, 66 Neb. 349 ..	37
Stone v. Mississippi, 101 U. S. 814	44, 48
State v. Lipkin, 168 N. C. 265	39

V.

	Page
Shallenberger v. First State Bank, 219 U. S.	
114, 172 Fed. 999	20
Standard Computing Scale Co. v. Farrell, 249	
U. S. 571, 242 Fed. 87	34
State <i>ex rel.</i> Goodsell v. Woodmanse, 1 N. D.	
246	21
State of South Dakota v. Scougal, 3 S. D. 55 . .	20
Terminal Taxicab Co. v. Dist. of Col. 241 U.	
S. 252	28
Truax v. Corrigan, 257 U. S. 312	31
Truax v. Raich, 239 U. S. 41	45
United States v. Fulkerson, 74 Fed. 619	35
United States v. Purvis, 195 Fed. 618	35
United States v. Cohen Grocery Co., 255 U. S.	
81	47
United States v. Armstrong, 263 Fed. 683 . .	46
Union Dry Goods Co. v. Georgia, 248 U. S.	
372	46
Weber v. Freed, 239 U. S. 325	44
Wedesweiler v. Brundage, 277 Ill. 228	21
Weed v. Bergh, 141 Wis. 569	21, 24
Wight v. Davidson, 181 U. S. 371	46
Whitehead v. United States, 245 U. S. 670,	
245 Fed. 385	34
Wilmington Mining Co. v. Fulton, 205 U. S.	
66	28
Williams v. Milton, 215 Mass. 1	5
Wolff Packing Co. v. Court of Industrial Rela-	
tions of Kansas, 262 U. S. 523	19, 28
Yick Wo v. Hopkins, 118 U. S. 336	4



IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 690.

JAMES B. DILLINGHAM, as President, SYLVANUS B. NYE, as Vice-President, FREDERICK A. BALLOU, as Secretary and Treasurer, and each of them, as Trustees of THE MUTUAL BENEFIT LEAGUE OF NORTH AMERICA, operating under An Agreement and Declaration of Trust,

PLAINTIFFS-APPELLANTS,

AGAINST

GEORGE V. McLAUGHLIN, as Superintendent of Banks of the State of New York, CARL SHERMAN, as Attorney General of the State of New York, *et al.*,

DEFENDANTS-APPELLANTS.

BRIEF FOR THE DEFENDANTS- APPELLANTS.

Statement.

Upon order to show cause with bill of complaint and under temporary restraining order, application was made below before Mayer, C. J., Augustus N. Hard and Cooper, D. JJ., under Sec.

266 of the Judicial Code for an interlocutory injunction restraining the state officers concerned from enforcing Sec. 174 of the Banking Law of the state, which forbids the plaintiffs' business. The application was heard June 25, 1923, at Albany (p. 91). It was denied on that day, except as to contracts actually entered into, with leave to apply for modification in New York City on July 6th (pp. 157-158). Upon July 9th after adjournment, and in New York City, application for modification made by both sides was denied (p. 158). Whereupon all plaintiffs and defendants appealed directly here under Sec. 266 of the Judicial Code, and this Court upon joint motion on January 7, 1924, advanced the appeals for argument to March 10, 1924. The plaintiffs at pages 92-156 have printed the colloquy between Court and counsel at the Albany hearing, thus indicating the reasons for the Court's action.

Specifications of Error.

We are aggrieved because the Court below denied the statute present operation under a mistaken theory that it was really applying the statute only prospectively (pp. 167-168). Although the District Court held the statute was constitutional as to all business which might thereafter be newly begun, it invokes the contract clause of the Federal Constitution and permits thereby business of the same evil nature to continue which had been undertaken at the time the statute became effective. The bill was not dismissed for

want of equity and our answer was served before the first hearing (p. 49) with an affidavit by the defendant Superintendent of Banks (p. 53) and was followed by an answering affidavit in support of our opposition to an interlocutory injunction (p. 78). It seems we never reached the point of moving to dismiss the bill, because if we are right, the court should probably maintain its jurisdiction for the purpose of protecting the persons who have put their money into the company.

General Considerations.

Not only must the plaintiff come into equity and sustain itself here under the established maxims, but it may properly complain only of the effect of the statute upon its own business. *Engel v. O'Malley*, 219 U. S., 12. Consequently, in the succeeding argument, we refuse to anticipate any speculative argument upon the application of the statute to others not in the same situation, and shall confine ourselves to the face of the plaintiffs' papers, and the operation of the contract set up in its Schedule B (p. 47).

There being a disclaimer of diversity of citizenship (p. 25, fol. 99), the protection of the State Constitution is not well pleaded, and the Court under the first subdivision of Section 24 of the Judicial Code may take only the question of violation of the 14th Amendment. The statute must be scrutinized under the broad and generous principles of a court exercising nation-wide jurisdic

tion, in disregard of the minute and local. If citizens of a state require or seek more specialized treatment, their state government has provided tribunals where these considerations may be extensively urged, but where they protest against the laws of their own state under the protection of the extraordinary remedy of an interlocutory injunction as guarded by §266 of the Judicial Code, the unwarranted nature of the law attacked should not only clearly, but immediately appear; or they could have gone to trial on the issue tendered by our answer. Therefore, the attack must be confined to the statute as it reads in connection with the plaintiffs' business. Should it unfortunately be administered so as to affect businesses not properly within its terms or constitutionally subject to such restrictions, the Court may deal with such inequality or harshness of executive practice under the doctrine of *Yick Wo v. Hopkins*, 118 U. S., 356, when such a case comes before it.

The Form of Organization of the Plaintiffs' Business.

It is really the entity, MUTUAL BENEFIT LEAGUE OF NORTH AMERICA, that is suing.

It is organized as a common-law or "Massachusetts trust." (Declaration of Trust at pp. 79-89.) This is a form of business organization that has been widely popularized in the last decade, although it is only within about four years that

such trusts have become common in New York. We have learned in New York to at least tax such trusts as corporations. (§182 Tax Law as amended by Laws of 1922, Chapter 408.)

This Court has directly considered this form of organization in *Crocker v. Malley*, 249 U. S., 223. See also *Williams v. Milton*, 215 Mass., 1. From the cases and text writers we find that the following benefits are claimed to follow from such form of organization. (*The Law of Unincorporated Associations and Business Trusts*, Wrightington, S. R., 2nd Ed., Boston, 1923; *Business Trusts as Substitutes for Business Corporations*, Thompson, G. A., St. Louis, 1920.)

A. The advantages of corporate organization;

1: Limited liability to the extent of the corpus.

2: Perpetuity by the power to fill vacancies in trustees.

3: Operation as an entity, formerly illustrated by a corporation's right to use a seal.

B. Escape from the disadvantages of corporate organization:

1: Freedom from corporate taxes,

2: Freedom from extension of special and peculiar legislative regulation under the guise of the reserved power of a state over corporations,

3: The right of the trust, as composed of individual citizens of the United States, to

move freely from one state to another without the burdens that might be placed upon "foreign corporations doing business" outside the state of organization.

4: Legal advice of prima facie validity through a prayer for instruction in equity in the courts of the situs of the trust.

Observe in the opening paragraphs of their contract how the trustees are liable only to the extent of the corpus. It is such an organization, that comes here claiming every privilege and denying the power of the state to require a form or organization or to impose a regulation that will not leave the MUTUAL BENEFIT LEAGUE as free as an individual conducting a business unaffected with a public interest.

Restrictions on the Banking Business in New York.

A few states have denied entry into *any part* of the banking business to individuals and have confined the business to corporations. Not so New York, even under the statute complained of here. Section 22 of the General Corporation Law forbids any ordinary corporation from engaging in the banking business and is as follows:

"22. PROHIBITION OF BANKING POWERS. No corporation, domestic or foreign, other than a corporation formed under or subject to the banking laws of this state or of the United States, except as permitted by such laws, shall by any implication or construction

be deemed to possess the power of carrying on the business of discounting bills, notes or other evidences of debt, or receiving deposits, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt for circulation as money, or of engaging in any other form, of banking; nor shall any such corporation, except an express company having contracts with railroad companies for the operation of an express service upon the lines of such railroad companies, or a transatlantic steamship company, or a telegraph company, or a corporation incorporated prior to the year eighteen hundred and fifty, to promote the welfare of emigrants, possess the power of receiving money for transmission or of transmitting the same, by draft, travelers' check, money order or otherwise."

Section 663 of the Penal Law is typical of further restrictions put upon corporations. This provides:

"Section 663. ACTING FOR FOREIGN CORPORATIONS NOT AUTHORIZED TO DO BUSINESS IN THIS STATE.

Any person, or corporation, who:

1: Acts as agent or representative of any mortgage, loan or investment corporation or building and mutual loan corporation or association or co-operative savings and loan association organized outside of this state, while such mortgage, loan or investment corporation or building and mutual loan corporation or association or co-operative savings and loan association shall not be authorized under a license of the superintendent of banks to do business in this state; or,

2: Acts as agent or representative in this state of a foreign corporation, other than a moneyed corporation, with the words 'trust,' 'bank,' 'banking,' 'insurance,' 'assurance,'

'indemnity,' 'guarantee,' 'guaranty,' 'SAVINGS,' 'investment,' 'loan,' 'benefit,' or any other words or terms indicating, representing or holding out such company to be a moneyed corporation as a part of its name or corporate title, or who, in connection with such corporation or otherwise, shall put forth any sign containing said name, or who shall advertise or publish the said company as doing business in this state, directly or indirectly, through agents or otherwise, while such company shall not be authorized under a certificate procured from the secretary of state pursuant to section fifteen of the general corporation law to do business in this state,
Is guilty of a misdemeanor."

Sections 140 and 141 of the Banking Law also contain certain limited prohibitions against doing some parts of the banking business. These provide:

"Section 140: PROHIBITIONS AGAINST ENCROACHMENTS UPON CERTAIN POWERS OF BANKS.—No person unauthorized by law shall subscribe to or become a member of, or be in any way interested in any association, institution or company formed or to be formed for the purpose of issuing notes or other evidences of debt to be loaned or put in circulation as money; nor shall any such persons subscribe to or become in any way interested in any bank or fund created or to be created for the like purposes or either of them. No corporation, domestic or foreign, other than a national bank or a federal reserve bank, unless expressly authorized by the laws of this state, shall employ any part of its property, or be in any way interested in any fund which shall be employed for the purpose of receiv-

ing deposits, making discounts, or issuing notes or other evidences of debt to be loaned or put into circulation as money. All notes and other securities for the payment of any money or the delivery of any property, made or given to any such association, institution, or company, or made or given to secure the payment of any money loaned or discounted by any corporation or its officers, contrary to the provisions of this section shall be void.

No person, association of persons or corporation, unless expressly authorized by law, shall keep any office for the purpose of issuing any evidences of debt, to be loaned or put in circulation as money; nor shall they issue any bills or promissory notes or other evidences of debt for the purpose of loaning them or putting them in circulation as money, unless thereto specially authorized by law.

Every person, and every corporation, director, agent, officer or member thereof, who shall violate any provision of this section, directly or indirectly or assent to such violation, shall forfeit one thousand dollars to the people of the state."

"Section 141. USE OF SIGN, OR WORDS INDICATING BANK BY UNAUTHORIZED PERSONS PROHIBITED.—No person, except a national bank, a federal reserve bank, an individual banker or a corporation duly authorized by the superintendent of banks to transact business in this state, shall make use of any office sign at the place where such business is transacted having thereon any artificial or corporate name, or other words indicating that such place or office is the place or office of a bank; nor shall any such person or persons make use of or circulate any letterheads, billheads, bank forms, notes, receipts, certificates, circulars, or any written or printed or partly written and partly printed paper whatever, having

thereon any artificial or corporate name, or other word or words, indicating that such business is the business of a bank.

Every person violating this provision shall forfeit the sum of one thousand dollars, but this section shall not apply to any individual, partnership or unincorporated association engaged in the business of banking prior to May twenty-seventh, eighteen hundred and eighty-five."

See also the Penal Law, §§302, 290-305.

Article 4 of the Banking Law provides either for the supervision of individuals engaged in private banking in cities or their exemption from regulation upon compliance with certain conditions. It is too long for quotation here but substantially the same statute, when formerly administered by the State Comptroller, was attacked for unconstitutionality and received the favorable examination of this court in *Engel v. O'Malley*, 219 U. S. 128. See also *In Re Mandel*, 224 Fed. 642.

It, very generally speaking, requires a license from the Superintendent of Banks of all private bankers generally. It exempts from its application the large bankers like Morgan and Company under a provision that they shall not use an exterior or interior sign and do not accept deposits of less than \$500. Another small, and diminishing class, is partly exempted from supervision where doing business with a stated amount of capital.

Other articles of the Banking Law refer to "trust companies," "savings banks," "investment companies," "safe deposit companies," "personal loan companies and personal loan brokers," "*savings and loan associations*," "land banks of the State," "credit unions," and "state banks."

Under the opinions of the Attorney General of New York, however, there have not heretofore been any absolute prohibitions against individuals doing parts of the banking business not covered by the foregoing. Only corporations not organized pursuant to the Banking Law, labor under such an absolute prohibition.

The Statute Under Review.

The law under attack here attempts to extend the statutory regulation of individuals only a step further and to confine the business of the plaintiff where it properly belongs, in the hands of savings and loan or investment companies.

It is section 174 of the Banking Law effective June 1, 1923, when it was approved by the Governor. It provides as follows:

CHAPTER 895.

"AN ACT to amend the banking law, in relation to encroachments, by individuals as trustees or otherwise upon powers of private bankers, savings banks or savings and loan associations.

Became a law June 1, 1923, with the approval of the Governor. Passed three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, represented in Senate and Assembly, do enact as follows:

Section 1. Article four of chapter three hundred and sixty-nine of the laws of nineteen hundred and fourteen, entitled "An act in relation to banking corporations, individuals, partnerships, unincorporated associations and corporations under the supervision of the banking department, constituting chapter two of the consolidated laws," is hereby amended by adding thereto a new section, to be section one hundred and seventy-four, to read as follows:

§174. PROHIBITIONS AGAINST ENCROACHMENT BY INDIVIDUALS AS TRUSTEES OR OTHERWISE UPON CERTAIN POWERS OF PRIVATE BANKERS, OF SAVINGS BANKS OR SAVINGS AND LOAN ASSOCIATIONS. Except as herein before authorized, no individual, either for himself or as trustee, and no partnership or unincorporated association, shall engage in the business of receiving deposits of money or payments of money in instalments, for co-operative, mutual loan savings or investment purposes in sums of less than five hundred dollars each under a declaration of trust or otherwise, and no person shall within this state, either personally or by the publication or circulation of advertisements solicit the deposit of money with or the payment of money to, any such unauthorized individual, trustee, partnership or unincorporated association, under which such deposits or payments of money in instalments of less than five hundred dollars will become due and payable; nor shall any such unauthorized individual trustee, partnership

or unincorporated association engage or conduct a business similar to the business of a savings bank or of a savings and loan association, or promise to make loans at any time, either fixed or uncertain, upon real estate security for building, home-owning, savings or investment purposes as an inducement for the payment of such sums of money in instalments of less than five hundred dollars each to any such unauthorized person, trustee, partnership or unincorporated association.

Any person who shall violate any provision of this section shall be guilty of a misdemeanor.

§2. This act shall take effect immediately."

We do not complain particularly that the injunction against us was made to run from June 25, 1923 instead of June 1, 1923 when the act took effect, since that was the date of the hearing and the first opportunity the plaintiffs had to be heard. If there is to be any injunction June 25th, is as fair a date as any. A misdemeanor under §1937 of our Penal Law is punishable by a year in jail or \$500 fine or both.

The statute was passed by the legislature after hearings before the committees and briefs in opposition to its approval were submitted to the Governor. The statute was a state banking department bill and was deliberately aimed at the suppression of the business of these plaintiffs and of some 15 other loan trusts then doing business in New York. For these it was claimed by coun-

sel for one of the companies in opposition to the bill before the Governor, "outstanding contracts of over \$25,000,000" with approximately "50,000 investors" and "outstanding mortgage loans amounting to approximately \$1,000,000". The purpose of the statute is, therefore, preconceived and deliberate and the catastrophe threatening the plaintiffs does not arise because of the unforeseen consequences of unfortunate terminology or because of mistaken application or construction.

The Pleadings.

The complaint (pp. 19-31) alleges an organization under a declaration of trust in Erie County as a medium to bring home builders into cooperation. Three trustees manage the business under the supervision of the "Advisory Board of Contract Owners." 9,000 contracts have been issued and loans of \$220,000 made with contracts of a "face value" of \$7,000,000. Contracts are in units of \$100 up placed in series of \$140,000. "Each contract is entirely separate from all others" etc., etc. There are assets of cash \$75,000, first mortgages \$220,000, office equipment etc., of \$15,000 and contracts \$7,000,000. Business is done throughout the state. The statute is pleaded and allegations that it is "unreasonable and confiscatory" depriving the plaintiffs of "property without due process." It is said to violate the sixth section of the New York bill of rights and the contract clause and 14th amendment of the

federal constitution, repeating allegations of deprivation of due process and alleging the taking of property without due process, a denial of equal protection and of unreasonableness and arbitrariness. All the defendants are alleged to be citizens of New York and none of the plaintiffs is alleged to be a citizen of other states or territories or countries. The District Attorneys of the several counties are joined as defendants and relief is prayed for in the form of a declaration of unconstitutionality under the state and federal constitutions with injunctions against interference with "contract owners, present and prospective."

None of the District Attorneys of the several counties appeared upon the motion for an interlocutory injunction and they have not yet been required to answer.

The defendants, Superintendent of Banks and Attorney General, answered (p. 49) denying any information as to the leading allegations of the bill, admitting the enactment of the statute, its application to the plaintiffs and their intention to enforce it, but denying positively the allegations of unconstitutionality.

We shall deal with the supporting (pp. 32-48) answering (p. 53) and replying (pp. 61-77 and pp. 78-90) affidavits in the following analysis of the plaintiffs' business.

The Plaintiffs' Contracts.

An application form with a contract are attached to the plaintiff, Ballou's, affidavit at pages

45 and 47 (Schedules A and B). The deed of trust is printed at pages 79 to 89.

The company was organized in Erie County on July 28, 1921, and so has had no great experience test to support its claims.

In general this may be said of the contract:

If honestly conducted, a few benefits at the expense of the many. A few get loans at 3%, some pay 61% or more in awaiting the day of fulfillment.

Its operation depends largely upon forfeitures by those who do not continue payments and dividends may be paid from capital.

The first borrower by chance may get a 3% loan or sell his chance at an attractive bonus, but many must wait without interest until the end of the contract period of eleven years before receiving a penny.

At no place or time is a customer entitled *as a matter of right to his money*.

The contract has no real marketability.

By its title, the company claims to operate throughout the continent, and there can be no effective supervision of its "investments."

The deed of trust (pages 89-99) shows that the officers can be forced to account only a showing of actual *fraud* in a court of equity (fols. 310, 315, 317, 328).

The face of the contract leads the depositor to believe he is dealing with a banking institution, with the usual safe-guarded fiduciary relations, *and that the contract has a face value*. The contract is intricate and difficult and conducive of fraud in the hands of dishonest salesmen.

Now taking up specific clauses of the contract.

Section 1: The "prize" or right to borrow depends upon the "chance" of filing the "contract" after the payment of the "consideration." The quoted words constitute the accepted elements of a lottery.

Sections 2, 3, 5 and 6. The trust fund for the payment of obligations is entirely contingent.

Section 7: Death benefit is likewise contingent.

Section 9: The contract is without marketability for it is entirely discretionary where the League will place its loans. Property, no matter how good, may be refused a loan arbitrarily.

Sections 10 and 11: Paid up and non-participating certificates are entirely discretionary.

Section 12: No *obligation* until after 99 *consecutive* months.

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Section 13: Participation is contingent.

Section 14: Cash surrender privilege is contingent on existence of a fund. Depositor may get \$75 or less for \$150.

Section 15: Even the personal loan at 6% is highly discretionary. Depositor is entitled to \$15 on \$80 at most.

Section 16: The grace period is granted only in the discretion of the officers.

Section 17: The forfeiture provision is unduly harsh.

Section 18: The assignment is contingent upon marketability.

Section 21: Absolute power to amend against depositors and upon the back of the contract the depositor is bound by all these terms.

It is such a leonine contract lacking in real mutuality, that a court of equity is asked to protect against regulation by the State.

We shall not attempt an analysis of the provisions of the Banking Law relating to loan associations and investment companies. Suffice it to say this scheme could never be worked under those statutes, nor under any that a legislature would conceivably pass.

BRIEF OF ARGUMENT.

I.

The State may deny natural persons the right to engage in this banking business, and may limit the kind of banking business that may be done by the corporations franchised.

The business of conducting a National Bank has been confined since the beginning to associations exercising the privileges of bodies corporate and having certain protection, but subjected to restrictions and regulations that could not reasonably and constitutionally be applied to mere business corporations performing functions not affected with a public interest.

Wolff Packing Co. v. Court of Industrial Relations of Kansas, 262 U. S. 523.

We cannot learn that an application by an individual to the Comptroller of the Currency for a charter to conduct a national bank would be accepted and the charter granted. So it is with state banks.

The necessity of confining the banking business to corporations was long ago sensed by the courts of New York in *People v. Utica Ins. Co.*, 15 Johns, 358 (1818) where Chief Justice Thompson said at page 378:

“The right of banking, therefore, by any company or association has since the restraining act become a franchise or privilege derived from the grant of the legislation and subsisting only in such companies or associations as can show such grant.”

See also *Curtiss v. Leavit*, 15 N. Y. 9.

Nearly sixty years ago in *Davidson v. Lanier*, 4 Wall. 447, this Court noticed without disapproval an “act to suppress private banking.”

If the current of authority was diverted by the anomalous decision of the Nevada Court in *Marymont v. Nevada State Banking Board*, 33 Nev. 333, 111 Pac. 295, 1914, Ann. cases, 162 and by the South Dakota court in *State of South Dakota v. Scougal*, 3 S. D. 55, 15 L. R. A. 477, it was restored finally to its normal course and probably beyond re-examination in *Shallenberger v. First State Bank*, 219 U. S. 114. Mr. Justice Holmes entire opinion for an unanimous court was as follows:

“Mr. Justice Holmes delivered the opinion of the court.

“This is a suit by many banks to prevent the Banking Board of Nebraska from carrying out and enforcing an act similar to the Oklahoma statute just passed upon. It forbids banking except by a corporation formed under the act and provides for a guaranty fund. The Circuit Court held the statute unconstitutional and issued an injunction against the enforcement of it. 172 Fed. Rep. 999. For the reasons given in the foregoing case (*Noble State Bank v. Haskell*, dealing with guaranty of deposits, 219 U. S. 104) the decree of the Circuit Court must be reversed.

Decree reversed.”

The opinion of the United States Circuit Court for the Nebraska District, in which Mr. Justice Van Devanter sat as circuit judge, ^{suggested} ~~had been~~ in the *Shallenberger* case that the Nebraska Act forbidding individuals from engaging in banking ^{might be} ~~was~~ violative of the 14th Amendment, 172 Fed. 999. The requirement of guaranty of bank deposits by corporations was likewise in the case, but the major part of Judge Munger's opinion dealt with the prohibition upon the right of natural persons to do banking business. Cases supported by the rule of this court in the *Shallenberger* case, even where provisions of state constitutions were involved, as in Nevada and South Dakota, are: *State ex rel. Goodsill v. Woodmansee*, 1 N. D. 246, 11 L. R. A. 420 (1890); *Weed v. Bergh*, 141 Wis. 569, 24 L. R. A. N. S. 1216.

Wedesweiler v. Brundage, 297 Ill., 228, 130 N. E. 520 (1921) does not run counter to the weight of authority. The statute there now forbids banking by individuals and private bankers. The statute under review in the *Wedesweiler* case permitted incorporated express or telegraph companies to transmit moneys. The Illinois court said that if the prohibition had been confined to solvent banks the law would have been good. However, disregarding the arguments of convenience and custom prevailing elsewhere, it said, there was an unreasonable classification to forbid a real estate operator or a grocer to do what a telegraph or express company was allowed to do. (Laws of New York 1910 chapter 348 §29d (3) which was under review before this court in *Engel v. O'Malley*, 219 U. S.

128 *supra* contained the exception condemned by the Illinois court).

Now it follows from all this that not only may the legislature forbid individuals from conducting the banking business, but that it need not necessarily set up a corporate form under which each and every form of banking may be carried on, including the plaintiffs'. Some forms of banking it may forbid altogether or confine the operation thereof to particular kinds of banking institutions. It may forbid trust companies from accepting savings accounts and it may forbid savings banks from making personal loans on collateral or state banks from acting as administrators. Therefore, where the legislature provides for the specialized fields of savings and loan associations and investment companies, it may so circumscribe their operations that many desirable forms of business may not be touched by these institutions or by any other organized under the Banking Law. Sections 384 and 293 of the Banking Law typify how narrowly the business of institutions may be restricted. Section 304, referring to investment companies, indicates the problem constantly presented where foreign companies of much broader powers desire to be licensed in New York, but must be reconciled to the limited functions permitted here; and so through the entire code of corporation laws, relating even to business companies, many forms of business are forbidden.

The legislature in this case has seen fit to say that this banking shall not be carried on by a trust enjoying almost unlimited immunities and privileges. The form of organization of the plaintiff for this business, affected with a public interest, is unadapted to a discharge of its *quasi* public functions.

Congress in requiring National Banks to be incorporated has recognized this fact. Ordinarily promoters organize *business corporations* or limited companies for the purpose of obtaining corporate immunities.

Incorporation of banks is provided for under the Federal and State Laws for the primary purpose of regulation and control by the respective governments. Consequently the National Bank Act provides for entities known as National Banking Associations; limited liability for the owners, and the right to do business as an entity is not the fundamental purpose sought there. Under Sec. 5136 of the Revised Statutes such corporations or associations are given some of the usual corporate powers and privileges, but the rest of the act is all directed towards regulation.

There are three reasons why any banking business should be carried on by a corporation.

1. In order to protect the funds of the institution from the personal creditors of the owners of the institution (This is the antithesis of the protection against personal lia-

bility sought by promoters and investors for themselves in the organization of business corporations).

2. To avoid embarrassments incident to death followed by administration of the owner's estates in the probate courts.

3. Finally, ease of supervision, visitation and inspection coupled with the reserved power over corporations which may extend regulation beyond that applicable to individuals, even in a business affected with a public interest.

These reasons have received judicial recognition.

See *Weed v. Bergh*, 141 Wis. 569, 124 N. W. 664, 25 L. R. A. (N. S.) 1217 and note to other cases. Of course, the plaintiff may say that its form of organization meets to a slight extent the first two purposes. Still, this is not enough; the convenience of corporate organization and the reserved power of the legislature over such companies is decisive on the necessity for incorporation. See *People v. Beakes Dairy Co.*, 222 N. Y. 416, where it was held that even a business not affected with a public interest was subject to much greater control where carried on by a corporation than by a natural person.

II.

The plaintiffs' business is that of banking, as the conception of that business has been developed.

Referring to our analysis of the plaintiff's contract at pages 15-18 of this argument, we note the Mutual Benefit League of North America accepts deposits from its contract holders, loans money on mortgage, buys and sells negotiable instruments and pretends to encourage savings. All these functions are allocated to some of the institutions organized under the Banking Law of New York and under the supervision of the Superintendent of Banks. The fact that the plaintiff is, as we shall later show, also a lottery in defiance of sections 1370-1386 of the Penal Law of New York and is denounced under section 213 of the Federal Criminal Code, does not free its business from this banking complex.

Its business does not fit snugly into the common definition of banking as given *Mercantile Bank v. New York*, 121 U. S. 138, 156, yet its business does invade to some extent the clearly defined field of two classes of corporate institutions, which have been denominated as of a banking character by the Legislature of New York in the fullness of its power.

Under section 2 of the Banking Law, Investment Companies are defined as follows:

“Investment company. The term, ‘investment company,’ when used in this chapter,

means any corporation other than an insurance corporation formed under the laws of this state or of any other state, and doing business in this state for the purpose of selling, offering for sale, or negotiating to individuals other than bankers bonds or notes secured by deed of trust or mortgages on real property or choses in action, owned, issued, negotiated or guaranteed by it, or for the purpose of receiving any money or property, either from its own members or from other persons, and entering into any contract, engagement or undertaking with them for the withdrawal of such money or property at any time with any increase thereof, or for the payment to them or to any person of any sum of money at any time, either fixed or uncertain.

Savings and Loan Associations are defined in the same section as follows:

“Savings and loan association. The term, ‘savings and loan association,’ when used in this chapter, means a domestic moneyed but none stock corporation formed for the purpose of encouraging industry, frugality, home-building, the saving of money by its members, the accumulation of savings, the lending of such accumulations to its members, and the repayment to each member of his savings when they have accumulated to a certain sum, or at any time when he shall desire the same, or the association shall desire to repay the same. The term, ‘savings and loan association,’ shall include every corporation, company or association doing business in this state and having for a part of its title or name the words ‘building association,’ ‘building and loan association,’ ‘building and mutual loan association,’ ‘savings and loan association,’ ‘savings association,’ ‘co-operative loan association,’ or ‘co-operative bank,’ and every corporation, company or associa-

tion whose shares are wholly or in part payable by a cumulative fund in regular or periodical instalments, or which is doing business in the form and of a character similar to that authorized by this chapter organized or incorporated in this State."

Although neither of these institutions is a bank in the popular sense, nor even under the arbitrary definition of bank in the New York statute, nevertheless the business of investment companies and savings and loan associations is of the nature of banking and all we have said as to the power to confine such functions to corporations, with equal propriety applies. The Legislature has cut the cloth and these plaintiffs must shape their garment to it, when, and if, they incorporate.

The business of the plaintiffs may not comprehend every function of all banks and their purposes may even be mixed, but nevertheless they are doing a banking business subject to regulation. 7 *Corpus Juris* 473-478 contains many definitions. See also 3 *Ruling Case Law* 374-375.

III.

The statute constitutes reasonable regulation under the police power.

A bank is a *quasi* public institution, *Guthrie v. Harkness*, 199 U. S. 148, 156. Beyond life insurance, it is subject to the most complete public regulation, *German Alliance Insurance Co., v. Kansas*, 233 U. S. 389, and is not ordinarily subject to the dual control arising from relation to interstate commerce, *Paul v. Virginia*, 8 Wall, 168.

The business in all its branches was at an early date recognized as affected with a public interest. *Bank for Savings v. Collector*, 3 Wall 495, 510. Therefore, all that has been said upon that subject in *Munn v. Illinois*, 143 U. S. 517, *Budd v. New York*, 143 U. S. 517, *Brass v. Storsen*, 153 U. S. 391, as to grain elevators, public or private, in *Terminal Taxicab Co. v. Dist. of Col.*, *Packard v. Banton*, decided Feb. 18, 1923, 241 U. S. 252, as to taxicabs, in *Wilmington Mining Co., v. Fulton*, 205 U. S. 60, as to mines, in *New York Tenement House Dept. v. Moeschen*, 179 N. Y. 325, affirmed without opinion, 203 U. S. 583, as to tenement houses and culminating in *Noble State Bank v. Haskell*, 219 U. S. 104, as to banks, applies with equal force to the business in the case at bar. Of all businesses, this business is probably farthest from the line marked out in *Wolff Packing Co., v. Court of Industrial Relation of Kansas*, 262 U. S. 523, *supra*.

The highly fiduciary relation of banks to their customers, and the inferior relationship occupied by many depositors, justifies the distinction made by Chief Justice Taft in that case in comparing less public businesses, where he says:

“The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public and on the abuses reasonably to be

feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

In the briefs before the Governor, and at the hearings before the Legislative Committees, certificates of accountants to prove that the project of these loan trusts are solvent were produced and are produced here again (p. 175). The police power, however, does not merely supplement the criminal law and deal with frauds, embezzlers, positive misrepresentation, and direct violations of moral and ethical standards. A casual survey of a few of the statutes, like those dealing with fuel, foods, pawnbrokers, net weight, contracts of hiring, education, public health, real property, liability in tort, payment of wages, hours of labor, housing and the poor, is enough to show that this police power is as often invoked to protect persons from their own folly. The police power is applied particularly where under the concept either of relation or contract, one of the parties is in a less favorable position, as here.

Justification for this statute need not be based on prevention of fraud alone, although we think we shall show the existence of this undesirable element. The analogy of lotteries, tontine and Lloyds insurance supports us. Lotteries were conducted honestly for the purpose of endowing colleges, and for building sacred edifices, in this country by persons of unimpeachable morality and throughout the world today our notion of the essential ethical disadvantage in lotteries has not everywhere been accepted by honorable men. Tontine insurance, by which the survivor of a group took all, has likewise been forbidden by many states. In such schemes, as here, a few benefit at the expense of the many. Lloyds insurance as operated in London, and throughout the world, is entirely forbidden our New York insurance corporations. An individual may no more become an insurance company under our statutes than he may become a savings bank or trust company.

The situation here is no different. First, natural persons are prohibited from carrying on a certain part of the banking business. Secondly, that part of the banking business so prohibited to natural persons, is not altogether allowed to corporations; only a certain part of the contract much restricted may be written by savings and loan associations or investment companies.

This business of cooperative loaning is as subject to a restraint or a restriction to the bounds of the functions of building and loan associations or

by a regulation requiring a special form of corporate organization under the state supervising officer, as is that of private bankers. See *Engel v. O'Malley*, 219 U. S. 129 *supra*. See also the opening chapter of *Building and Loan Associations*, Thornton & Blackledge, Albany 1898, and *Law of Building and Loan Associations in Pennsylvania*, Sundheim, Joseph H., Philadelphia 1913, for good historical reviews of state legislation leading to control of such associations. Also *New York, Assembly Documents for 1856* vol. 3 for discussion of building and loan associations when first organized in New York.

IV.

As a matter of fact the business of the plaintiffs partakes of the elements of gambling and of a lottery, and depends upon the folly of the ignorant, inexperienced and credulous.

Every police power case involving regulation case ultimately rests upon a question of fact. Is the statute "wanton", "spoliative" and "capricious"? These are the adjectives used in the formulae of the later decisions. *Jones v. Brim*, 165 U. S. 180, 182, *Booth v. Illinois*, 184 U. S. 425, 429, *Lemieux v. Young*, 211 U. S. 489, 496, *McLean v. Arkansas*, 211 U. S. 539, 548, *Truax v. Corrigan*, 257 U. S. 312, 329, etc., etc. Were this not a banking business which, as we have shown, the legislature could compel to incorporate and

then deny the power now exercised, no other point need have been discussed.

So treating this now solely as a case of regulation of a business affected with a public interest, we charge two things:

a. That the business is undesirable and hurtful in the community, and conducive of fraud or speculation even though it is conducted honestly and efficiently, like a lottery, Lloyd's tontine insurance, a dairy for the sale of pure, but unpasteurized milk to infants, a store where honest weight is given without marking, etc.

b. That it is fraudulent upon its face and a lottery, since money is not loaned at 3%, and there is never a time any place where a customer has a *right* to demand back his money, although the scheme is represented to be for investment, thrift and savings without speculative or gambling features.

The affidavits of the Superintendent of Banks bears out both these contentions (p. 49). He further shows the adverse action of other states in regard to these trusts, and his own opinion as to their present operation is likewise entitled to weight. Extensive enactment of a statute is a fact "of vast significance", *Halter v. Nebraska*, 205 U. S. 34, 40. The briefs before the Governor indicate that New York has become the last refuge of these schemes. Over fifteen companies, mostly newly organized, like the plaintiff, are doing business here. They claimed they had 50,-

000 customers with contracts of a face value of \$25,000,000 and mortgage loans of over \$1,000,000. If the legislature in this state had not stepped in, the business bade fair to assume its greatest development in New York.

The statute was a deliberate and careful act of the legislature, being introduced in the Senate on April 4th, and signed by the Governor on June 1st. In the meantime, numerous hearings were held and a great deal of argument heard. (fols 196-198). It cannot be said that the legislature acted either hastily or without reason. These trusts by their own claim must possess some interest to a large constituency, which would insist that any legitimate claims they have, be heard. Their representatives were heard, but the claims were unsound.

THE LOTTERY FEATURE.

The accepted elements of a "lottery" in the case law are, a consideration, b, prize, c, determination by chance. These elements appear here. Counsel for the plaintiffs claims that there is no chance in this scheme, because the hour and minute of entering into the contract determines the right to the loan and not the intervention of some person numbering the contracts on receipt. (Plaintiff's brief p. 35). We cannot see the difference, between this method and the schemes condemned in the following cases, especially where salesman are scattered over the State. If there is no chance here, then there is none in a

baseball pool. The prizes, of course, are the right to loan ahead of the others and the promise of a sale at a bonus for the lucky members.

This court has twice, in denying certiorari, tacitly condemned very similar schemes as lotteries under the Federal mail laws.

Whitehead, et al. v. United States, (5th Circuit), 245 Fed. 385, 157 C. C. A. 547, certiorari denied here, Jan. 14, 1918, 245 U. S. 670. Whitehead and Harris were indicted with the Standard Home Company for fraudulent use of the mails. The judgments of conviction were affirmed. We will depend upon counsel for the plaintiffs to point out how the scheme there differs in any essential from that of the Mutual Benefit League of North America in the case at bar. The defendants there, it is true, were also charged with concealing the fact that a loan was made only in order of the contract number and we cannot at this point in the litigation prove such positive and active fraud here. We do say the contract is confusing and misleading and that what is a speculation or a gamble appears, before analysis, to be an investment. Plaintiffs put in large letters on the first page "Face Value \$—" when in fact the value is entirely speculative. However, we are dealing now with a state's right to forbid a business susceptible to fraud, whether anyone is fooled or not. *Standard Computing Scale Co. v. Farrell*, 249 U. S. 571, particularly Judge Hough's opinion below in 242 Fed. 87. At

page 392 of the Federal Reporter, in the *Whitehead* case, the Court points out how the involved verbiage of the contract may result in deceit. That is present in the case at bar and is a good defence, at least, to the extraordinary remedy in equity of interlocutory injunction.

Mac Donald, et al. vs. United States, (7th Circuit) 63 Fed. 426, 12 C. C. A 339, certiorari denied here, Dec. 12, 1894, 159 U. S. 260. There the value of bonds in an investment company bearing the characteristic title of "Guarantee Investment Company" depended upon their numbering, which was done by the secretary in the order that applications for the bonds reached him. Upon conviction for using the mails for a lottery, the defendants brought error and the judgments were affirmed.

United States v. Purvis, 195 Fed. 618 (N. D. of Georgia, Newman, D. J.) The court overruled the demurrer to the indictment for using the mails for a lottery. Opportunity to secure a loan was determined by the order in which applications were received. The court cites the unreported decision of Judge Mc Comas of the Supreme Court of the District of Columbia in *United States v. Sherwood*, where a similar plan of the National Investment Company was condemned.

United States v. Fulkerson, 74 Fed. 619. (S. D. California, Wellborn, D. J.) The demur-

rer to the indictment for illegal use of the mails was overruled. This was an insurance scheme of the United Indemnity Company with benefits contingent upon the order in which applications were received.

Fitzsimmons v. United States (9th Circuit) 156 Fed. 477, 13 L. R. A. (N. S.) 1095. See also for companion case, 156 Fed. 482. Judgment of conviction for misuse of the mails was affirmed. The Cumulative Credit Company conducted a loan scheme in which the numbering of the applications determined the loan.

Mc Laughlin v. National Mutual Bond & Investment Co., (Circuit Court E. D. Pennsylvania) 64 Fed. 908. Here an investor could not get back all he put in, but a chance was offered by which out of forfeitures some investors might obtain great benefits. Here again the social evil of such schemes is noticeable, for the scheme was advertised as one for savings.

It may be well to note at this point that the certainty, or even the chance of loss, are not necessarily elements of a lottery. *People v. McPhee*, 139 Mich. 687, 103 N. W. 174, 69 L. R. A. 505, where every member of the club obtained a suit of clothes. See also to the same effect *Grant v. State*, 54 Texas Crim. Rep. 403, 112 S. W. 1068, 21 L. R. A. (N. S.) 876. In *Horner v. United States*, 147 U. S. 449 the element of certainty was

present and the whole subject of lotteries was extensively considered by Mr. Justice Blatchford; but the element of certainty went hand in hand with the chance of obtaining a prize in the purchase of Austrian bonds. Plaintiffs on page 59 of this brief rashly indicate how their preconceptions of the law from a reading of some state cases have been overturned by the rule of the *Horner* case.

Public Clearing House v. Coyne, 194 U. S. 497. This was "The League of Equity" case. A fraud order of the Postmaster of Chicago had denied the Public Clearing House the use of the mails. This was a scheme dependant upon lapses and cooperation, in essentials like the one at bar. It was condemned by this Court as a lottery.

The cases in the State courts are, with one exception, in Georgia, uniform in their holdings that such schemes as the plaintiffs' in the case at bar, are either lotteries under state constitutions or penal laws, or subject to applications of the police power.

State ex rel. Prout v. Nebraska Home Co. (1902), 66 Neb. 349, 92 N. W. 763, 60 L. R. A. 448. This was a home building scheme condemned by the court as a lottery which in all essentials was the same as in the case at bar, i. e., monthly payments to \$1,000, numbering of contracts, forfeitures, etc. It is significant that the very same

application of these ancient fundamental principles to home building companies have been under the scrutiny of the state and federal courts for more than twenty years and the companies still spring up. Only a drastic statute like this in the case at bar will suppress their appeals to cupidity and ignorance.

Fisher v. State of Ohio, 140 Ohio Ap. R. 355 is a case decided as late as 1921 where the Cooperative League of North America was doing business from Pittsburg as a common law trust. This was a 3% loan company with \$140,000 series and almost the blood brother of The Mutual Benefit League of North America. The conviction for violating the state lottery statute was upheld.

State ex rel. Sheets v. Interstate Savings Investments Co., 64 Ohio, St. R. 283, 60 N. E. 220, 52 L. R. A. 530. This company promised unknown members of an investment security company that debentures would be called ahead of the others and paid. The scheme was condemned as a lottery.

State ex rel. Hathorn v. U. S. Express Co., 95 Minn. 442, 104 N. W. 556. Bonds were to be paid in a numerical order determined by lot. The Express Company successfully resisted application for mandamus to compel it to ship matter relating thereto.

Fidelity Funding Co. v. Vaughn, 18 Okl. 13, 90 Pac. 34, 10 L. R. A. (N. S.) 1123. This was a semi-tontine scheme by which all the persons that remained in the scheme should get all moneys arising from lapses. This was condemned by the Court as a lottery.

Equitable Loan & Security Co. v. Waring, 117 Ga. 599, 62 L. R. A. 93, 44 S. E. 920, 97 Am. St. Rep. 177. This case departs from the current of authority, but there was strong dissent. Nevertheless, the Georgia case does not deny the Legislature's power constitutionally to expressly denounce the scheme the Court held was not a lottery.

However, in 1907, the Georgia Court again had occasion to consider the question in *Russell v. Equitable Loan & Security*, 129 Ga. 154, 12 Ann. Cas. 129, and the court being equally divided, the judgment of the court below holding the contracts illegal was affirmed.

State v. Lipkin, 168 N. C. 265, Ann. Cases, 1917, D. P. 137. Here the Mutual Supply Company sold furniture, but there was determined by chance that some might not have to pay at all and failure of an installment resulted in forfeiture. Again we pause for comment and note how these companies resort to "Mutual" and "Cooperative" and other terms of brotherhood in their titles, but hold out to the "investor" in every

case that his fellow venturers will be nicely and lawfully deprived of their savings for his benefit.

We think it makes no difference whether the acts of the plaintiff are also punishable under Section 1370 of our Penal Law relating to lotteries. The point is that the very scheme here has been condemned under the regulatory powers of Congress exercised incidentally and by the police powers of the states operating directly. We have a choice of methods, either by specific treatment as in the case of Section 174 of the Banking Law, or we might, perhaps, but by our own choice, resort to the general provisions of the state statute as to lotteries. Even if the officers of this plaintiff are not indictable in the state and federal courts for running a lottery, the legislature still has power to condemn the scheme, although it may not be essentially criminal or unmoral.

THE LIMITATION OF \$500.00 AND THE PEREMPTORY CHARACTER OF THE STATUTE.

Plaintiff may object that individuals receiving deposits of \$500.00 or more are not required to incorporate. Article 4 of the Banking Law now exempts from supervision private bankers who customarily accept deposits of \$500.00 or more. This has been held a valid classification in *Engel v. O'Malley*, 219 U. S. 128, *supra*, where this same exemption in the New York statute was attacked. See also *In re Mandel*, 224 Fed. 645, *supra*, opinion by Judge Learned Hand.

*7 V. Cooperative
Ague 12/13 N.E.
(Mass 1923)
Home Planners
Stuyvesant 253
U. 229
Nov. 1923*

The act takes effect immediately, as it should, if it is to protect the public from harm. The companies have all the time a court of equity will allow for liquidation. New business may not be obtained, however. We venture the prediction that this scheme, like all endless chains, or "Ponzi-roll-ups", depends upon constant acquisition of new deposits to maintain even an appearance of solvency.

V.

The District Court erred in enjoining the defendants from prosecuting the plaintiff and enforcing the statute against the plaintiff as to contracts actually entered into on or before June 25, 1923.

The prohibitions of the statute under review are enforceable only by criminal prosecution. Even if we should resort to equity under extraordinary powers given the Attorney General in another connection, we are met with the certainty that we should offend against the spirit of the order in this case, should we at all disturb the business of the plaintiff already undertaken. They are doing business as individuals and entitled to all the immunities of witnesses. They are not subject to the supervision of the Superintendent of Banks or required to make any reports or disclose anything to him. Consequently, the statute, under this injunction, has been a dead letter. We cannot separate the chaff from the wheat. Ours was indeed a barren victory in the District Court.

We think the learned judges below began to perceive this; for the leave to apply for modification was granted for the benefit of the plaintiffs at the Albany hearing and the Court refused to carry their original decree to the more disastrous consequences threatened, at the bearing in New York on July 9th. Nevertheless, it still serves the purposes of the plaintiffs. They are still in business and while this decree continues will probably always be in business, for only they can define and isolate the new business, *and they are not required to tell.*

They successfully invoked the contract clause on two grounds, i. e.,

(a) The plaintiffs had contracts with persons for monthly payment under which said contract holders have a vested and absolute right to keep on paying in for themselves as first agreed, with the corollary that the plaintiffs have a right to enforce demands for such payments from the contract holders despite the statute.

(b) The plaintiffs had further agreed to fill out each series containing a contract by getting new business with other buyers of contracts so that the benefits of cooperation would accrue to those already in.

We think, from the discussion around the table in New York, the learned judges meant to deny "b" but intended we should not interfere with

"a". Still, the order is ambiguous and we should probably have to move to modify or to pray instruction before we could proceed against even an attempt to sell new contracts or new series even if we could find out what their salesmen were selling.

At all events, the Court below erred in affording the company the protection of its mandate to continue in business, even for the purpose of collecting the money it had already "contracted" to take from contract holders actually signed up.

The whole scheme is inherently vicious and could be stopped midway by a state under a statute enacted for the first time, as constitutionally as an agreement to work little children in a dynamite factory, or a contract to deliver alcohol to a grocery store, or a contract to erect a building without the fire exits, or an agreement to supply people with brass knuckles or firearms.

It seems that the real inquiry now is not, is this a contract, but is this a legitimate exercise of the police power? Once the purpose and the necessity of the act for the regulation or even the suppression of a business affected with a public interest is determined, then property, liberty and even contracts must yield before this power reserved to the state. The apprehension of danger to property, liberty and contracts may cause the court to proceed with caution, but once it is determined that there are reasonable grounds for

the legislative act, the incidental disaster to a contract or the destruction of property does not invalidate the law. This exercise of power will be examined as uncritically as a Congressional declaration in relation to any agency it exclusively controls.

Hoke v. United States, 232 U. S. 563;

Weber v. Freed, 239 U. S. 325;

Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467;

State of New York v. United States, 257 U. S. 591.

The confusion concerning this subject is illustrated by *Gregory v. Trustees of Shelby College* (1859), 59 Ky. 589, *Davis v. Caldwell* (La. 1842) 2 Rob. 271, *Mississippi Society of Arts & Sciences v. Musgrave* (1870) 44 Miss. 820, where it was found that agreements with third persons under a lottery grant from a state, had all the sanctity of the bonds of matrimony.

Yet in *Stone v. Mississippi*, 101 U. S. 814, *Douglass v. Kentucky* 168 U. S. 488 and in *Andrews v. Andrews*, 188 U. S. 14 this court made little difficulty with the contract clause in any relation of lotteries. Still it must be noted in the case at bar there has never been any affirmative sanction, grant of privilege or licensing by the state. The agreements or "contracts" were made either in defiance of our penal laws or subject to later regulation as in *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467, *supra*, where an agreement to take a railroad pass in settlement of a personal injury

was later destroyed by the later Congressional enactment forbidding passes generally. The State of New York never made even a colorable pretense of "bargaining away" its police power to these plaintiffs in the case at bar.

Yet, the court below declares we cannot interfere with a continuance of what has been agreed upon, although we can forbid parties from ever so agreeing again. Surely, if the first part of this proposition is true under the contract clause, the second is a denial of the existence of the 14th amendment. If the right to go on is so sacred, necessarily the right to begin again is likewise a liberty or property to be protected. "Freedom of contract" is equally protected under the 5th and 14th amendments with the obligation of contract under the contracts clause. *Adair v. United States*, 208 U. S. 161; *Coppage v. Kansas*, 236 U. S. 1; *Truax v. Raich*, 239 U. S. 41. The court below, however, gave the two unequal value.

Yet, the contract clause is subject to limitation by the police power in the same way as the 14th amendment. Indeed, the immunities and privileges of the 14th amendment include all the protection afforded by the contract clause. Since the time of the enactment of the 14th amendment the contract clause has less emphasis than when in Marshall's time it was the only federal restriction against the confiscation of property by states. If this is not true, the states are forbidden to impair contracts, but Congress, despite

the 5th amendment, is free to destroy the property in a contract. Yet this cannot be so. *Wight v. Davidson*, 181 U. S. 371 at 387 (dissenting opinion), *United States v. Armstrong*, 263 Fed. 683, 690. *Loan Association v. Topeka*, 20 Wall 655, 663-664. *Hepburn v. Griswold*, 8 Wall 603, 623. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, *Cincinnati v. Louisville & Nashville R. R. Co.*, 223 U. S. 390, *Fletcher v. Peck*, 6 Cranch 87. Except for the contract clause, prior to the 14th amendment, the states were once free to take private property without compensation, so far as the federal constitution was concerned, *Barron v. Mayor and City Council of Baltimore*, 7 Peters 243.

We cannot perceive, therefore, why the state is not as free to act in the case of this inherently fraudulent scheme as could Congress, to which no "particularization" like the contract clause, applies. Only recently in *Omnia Co. v. United States* 261 U. S. 502 this court held again that a valuable contract right is a property right and protected against federal destruction by the Fifth amendment; yet the government could take the entire product of a steel company and make impossible delivery to customers, as "contracted" for without violating the constitutional provisions in time of war. Although, this was done under the war power, the guarantees of the 5th and 6th, amendments and consequently of the 14th, still

persist even in the face of the greatest national emergency, *United States v. Cohen Grocery Co.*, 255 U. S. 81, 88.

Aside from the emphasis laid upon the contract clause historically, we can think of no reason why the prohibition against "impairing the obligation of a contract" and the guarantee of "due process" should be measured by different rules in the face of the police power of the states when contrasted with the delegated powers of Congress operating upon the same subject matter. Illustrative is the case of *Chicago & Great Western R. R. v. State of New York*, 197 App. Div. 742, affirmed without opinion, 233 N. Y. 66, where it was claimed that the making of a "contract" to transfer stock prevented the State from later enacting a law taxing such transfer.

The plaintiffs' proposition must ultimately be that although the national government may take the property in a contract for public use upon the payment of compensation or may destroy it by regulation or the exercise of its war power or some other delegated and exclusive authority, the states may never under any circumstances do an act even under the embracing police power which results in effect or incidentally in the impairment of the obligation of a contract.

This court has summed up our proposition in *Manigault v. Springs*, 199 U. S. 473, 480-481.

“It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are, where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the State prohibiting the establishment or continuance of such traffic;—in other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good.

While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary—a discretion which courts ordinarily will not interfere with. The leading case upon this point is that of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, in which a franchise to maintain a ferry between Cambridge and Boston, under which a bridge was subsequently erected, was held to be subject to the power of the Legislature to establish a parallel bridge between the same points. In *Stone v. Mississippi*, 101 U. S. 814, a charter to a lottery company for twenty-five years was held to be subject to the power of the State to abolish lotteries altogether. Similar

cases announcing the same principle are *Boyd v. Alabama*, 94 U. S. 645, *Beer Company v. Massachusetts*, 97 U. S. 25; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 672; *Mugler v. Kansas*, 123 U. S. 623, 665; *Chicago & R. R. Co. v. Chicago*, 166 U. S. 226."

We submit, that in the application of their respective regulatory powers the state and federal government stand in equal authority under the 5th and 14th amendments and that the "particularism" of the contract clause, despite its great historical importance should not be permitted to disturb the application of the police power as developed by this court in the face of the later sweeping guarantees for the people against their states.

A fair construction of the statute under review is that deposits for this cooperative scheme shall not be received from the time the statute took effect. If the plaintiffs are solvent as they claim, they can certainly liquidate in a court of equity which is fully competent to administer the trust as long as may be necessary for the protection of the corpus and the paying off of contract holders.

VI.

The Court, if it should reject our preceding points, should deny an interlocutory injunction until there is a trial of the issues and the defense has made its case.

The plaintiffs are inviting an extraordinary jurisdiction which should be exercised only in the clearest cases. The interlocutory injunction sought here is administered under principles the reverse of those applied in the state courts. It is not enough to show merely a cause of action with the likelihood of injury until it is decided. On the contrary, an interlocutory decree here has almost the finality of a permanent decree, as the direct appeal to this court and the requirement for three judges below indicate.

We know a great deal about the business of these trusts generally, as we have disclosed in our answering affidavits. Concerning these particular plaintiffs, we know what is shown on the face of their papers, but much is concealed from us, as the denials in our answer of every material allegation made by them, show. The plaintiffs have put their best foot forward in their moving papers but we have had no opportunity to subject them to close examination.

Should our argument in the nature of a demurrer to the moving papers be disregarded, the

merits of these particular plaintiffs' claim, in the face of our denials, should be established by proof. Otherwise, the record may be insufficient.

CONCLUSION.

The decree of the District Court should be affirmed with costs insomuch as the plaintiffs' prayer for an interlocutory injunction is denied, but should be reversed with costs, insomuch as until the final decree herein the defendants are enjoined from prosecuting these plaintiffs and enforcing the provisions of chapter 895, Laws 1923, against plaintiff as to contracts actually entered into on or before June 25, 1923.

Albany, N. Y., Feb. 23, 1924.

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